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ABSTRACT

The basic purpose behind the Paris Conference was to satisfy the practical needs of developing countries for ready access to educational, scientific, and technical works, without weakening the structure and scope of copyright protection offered by developed countries under both the Universal Copyright Convention and the Berne Convention. This document contains testimony by seven witnesses and six prepared statements to the Senate Foreign Relaticns Committee. (A related document is ED 060 869.) (NH/SJ)

ED 070473

REVISED UNIVERSAL COPYRIGHT CONVENTION

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HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

NINETY-SECOND CONGRESS

SECOND SESSION

ON

EXECUTIVE G, 92D CONGRESS, 2D SESSION

THE UNIVERSAL COPYRIGHT CONVENTION, AS REVISED AT PARIS ON JULY 24, 1971, TOGETHER WITH TWO RELATED PROTOCOLS

AUGUST 2, 1972

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REVISED UNIVERSAL COPYRIGHT CONVENTION

WEDNESDAY, AUGUST 2, 1972

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, D.C.

The committee met, pursuant to notice, at 10:45 a.m., in Room 4221, New Senate Office Building, Senator J. W. Fulbright (Chairman), presiding.

Present: Senators Fulbright, Javits and Percy.

The CHAIRMAN. The committee will come to order.

* * * * * * *

The CHAIRMAN. We will move to the Universal Copyright Convention, Executive G, 92–2. Our first witness is Mr. Bruce Ladd, Jr., Deputy Assistant Secretary for Commercial and Business Activities, Department of State.

Mr. Ladd, will you come forward?

STATEMENT OF HON. BRUCE C. LADD, JR., DEPUTY ASSISTANT SECRETARY OF STATE FOR COMMERCIAL AFFAIRS AND BUSINESS ACTIVITIES; ACCOMPANIED BY GEORGE D. CARY, REGISTER OF COPYRIGHTS, LIBRARY OF CONGRESS; AND HARVEY J. WINTER, DIRECTOR, OFFICE OF BUSINESS PROTECTION, DEPARTMENT OF STATE

Mr. LADD. Thank you, Mr. Chairman.

The Department of State appreciates very much having this opportunity to present its views on the Universal Copyright Convention, as it was revised at Paris in July of 1971.

Accompanying me today, on my left, is George Cary, Register of Copyrights of the Library of Congress; and, on my right, is Harvey Winter who is Director of the Office of Business Protection at the Department of State. Mr. Cary also has a prepared statement on the revised Universal Copyright Convention, which he will submit for the record, which discusses some of the more technical aspects of the Convention.

Before taking up the substance of the Paris revision of the UCC, I would like to briefly cite some of the historical background that I think is important.

NEGOTIATION OF UCC

Just 20 years ago, in August of 1952, the Intergovernmental Copyright Conference to negotiate a new worldwide copyright convention

was convened in Geneva, Switzerland, largely at the initiative of the United States. One of the primary reasons for convening this conference was to develop a new copyright agreement which would be acceptable to those States which had not been able to join the only existing worldwide convention, the Berne Convention, for a variety of reasons. The major developed country in this category was the United States.

The Universal Copyright Convention—UCC—was successfully negotiated and the United States ratified the convention in 1954. It came into force in 1955 and has been the keystone of our international copyright regulations since that date. As of the present date, 61 States are parties to the UCC.

REVISION OF BERNE CONVENTION

The next important development in the international copyright field was the Stockholm Intellectual Property Conference in 1967. One of the objectives of this conference was to revise the Berne Convention and include special provisions for the benefit of developing countries.

Since the United States was not a party to the Berne Convention, the United States delegation attended the Stockholm conference only in an observer capacity. The revision of the Berne Convention brought forth the so-called Stockholm Protocol which contained special provisions for developing countries in acquiring rights to copyrighted works for educational purposes. The protocol gave developing countries very broad and practically uncontrolled privileges regarding works copyrighted in Berne member states. Thus, there was a drastic shift in the direction of international copyright that threatened the foundations on which all multilateral copyright protection had been built since the negotiation of the Berne Convention in 1886. Many U.S. works, which had been protected under this convention by simultaneous publication in a Berne member state, were directly affected by this development.

Generally, the Stockholm Protocol was considered unacceptable by the developed countries and by the end of 1967 it was seriously questioned whether any important developed countries would approve the protocol. As a matter of fact, to date no major developed country has ratified or acceded to the Stockholm Protocol.

POSITION OF DEVELOPING COUNTRIES

When it became apparent during 1968 that developed countries were not going to accept the protocol, the developing countries, under the leadership of India, made their position quite clear. If positive steps were not taken to meet the legitimate needs of developing countries for copyrighted works for education, then these countries would seriously consider withdrawing from the Berne Convention. Because of a special clause in the UCC known as the "Berne safeguard clause," countries renouncing Berne could not rely on the UCC for protection in countries that were parties to both conventions. The result of the renunciation of Berne would have been the exodus of the developing countries from both major copyright conventions and a virtual collapse of the international copyright system as we know it today. Undoubtedly the unauthorized use of copyrighted works,

that is, book piracy, would have become an accepted practice in these developing countries with resultant adverse effects on American authors and publishers, and indeed on our balance of payments position. The United States is the leading book exporting country of the world and enjoys a strongly favorable balance of trade in books. The official Department of Commerce figures for 1971 show U.S. book exports in the amount of $177 million and U.S. book imports totaling $101 million. However, since these official statistics do not include shipments valued at less than $500, the true export figure is substantially greater. Further, these trade statistics do not include several million dollars a year in "invisible exports" in the form of royalties received for permission to translate or republish American works.

PREPARATORY WORK FOR PARIS CONFERENCE

To forestall developing countries renouncing the copyright conventions, the United States and other developed countries, including the United Kingdom, the Federal Republic of Germany, and France, took the initiative in carrying out a series of preparatory meetings in 1969 and 1970 which paved the way to the Paris Conference in July 1971, to revise simultaneously UCC and Berne. This preparatory work was undertaken with the full cooperation of the developing countries.

The two basic objectives of this simultaneous revision were set forth in the Washington Recommendation of September 1969:

(1) The level of protection in the UCC would be improved by the adoption of certain minimum rights, that is, the rights of reproduction, public performance and broadcasting. At the same time special provisions for the benefit of developing countries would be included in the UCC. Finally, the so-called Berne safeguard clause would be suspended to permit developing countries to leave the Berne Convention, if they wished, without penalty under the UCC.

(2) The Stockholm Protocol would be separated from the Berne Convention and, in turn, the developing countries would be able to substitute the special provisions included for their benefit in the UCC. However, as a protective measure, it was provided that the Stockholm Protocol would not be separated from the 1967 text of the Berne Convention until such time as France, Spain, the United Kingdom and the United States had ratified the revised text of the UCC. The purpose of this was to make ratification or accession to the revised text of UCC, which would contain new concessions for developing countries, the *quid pro quo* for separation of the Stockholm Protocol from the Berne Convention.

Because of the interrelationship and, in certain respects, the interdependence of the two conventions, the diplomatic conferences for the revision of the UCC and the Berne Convention were held at the same time in Paris at UNESCO, July 5 to 24, 1971. In all, 45 member states of the UCC participated in the conference; 30 other states had observer delegations and 3 intergovernmental organizations were represented at the conference.

REVERSAL IN TREND REPRESENTED BY STOCKHOLM PROTOCOL

At the Paris conference there was a significant reversal in the trend represented by the Stockholm Protocol. A number of important

demands of developing countries were abandoned at Paris with respect to broadcasting rights and broad uses of literary and artistic works for "teaching, study and research in all fields of education." Essentially, the concessions for developing countries at the Paris conference were limited to the rights of translation and reproduction.

INTRODUCTION OF CERTAIN BASIC RIGHTS OF AUTHORS

This revision of the UCC in Paris was the first since its adoption in 1952. It is generally recognized that the UCC was improved by the introduction of certain basic rights of authors. This has been accomplished in the following way: Article IVbis makes specific reference to Article I. Article I, which remains unchanged from the 1952 convention sets forth the undertaking of each contracting state to provide for "the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture." The new Article IVbis provides that the rights referred to in Article I shall include, and I quote, "the basic rights ensuring the author's economic interests, including the exclusive right to authorize reproduction by any means, public performance and broadcasting." These rights apply to works protected under the convention either in their original form or in any form recognizably derived from the original. It is further provided that any contracting state may, by its domestic legislation, make exceptions to such rights that do not conflict with the spirit and provisions of the convention, but that any state whose legislation so provides shall nevertheless accord a reasonable degree of effective protection to each of the rights to which exception has been made.

SPECIAL EXCEPTIONS FOR DEVELOPING COUNTRIES

Articles Vbis, Vter, and Vquater are the new articles in the revised UCC which parallel articles in the revised Berne Convention providing special exceptions for developing countries.

Article Vbis sets forth the procedure whereby a contracting state regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations may take advantage of the special translation and reproduction provisions.

In connection with the two key provisions of the UCC revision, Article Vter on translations and Article Vquater on reproduction, the following points should be stressed:

(1) Compulsory licenses under Article Vter are to be granted in connection with "teaching, scholarship or research" under Article Vquater for "systematic instructional activity." The emphasis obviously is on the use of copyrighted materials for educational purposes.

(2) Article Vter reduces the present 7 year period of absolute exclusive translation rights to 3 years for a developing country and "in the case of a translation into a language not in general use in one or more developed countries" that are party to either the 1952 or the 1971 text of the UCC, the period can be further reduced to one year.

(3) The applicable periods of exclusivity, during which no license can be issued under Article Vquater, vary. In general, the period is 5 years but a 3-year period is applicable to "works of the natural

and physical sciences, including mathematics and technology" and the term is 7 years for "works of fiction, poetry, drama and music, and for art books."

(4) Certain provisions in Articles Vter and Vquater prohibit the export of copies and prescribe that the compulsory license shall be valid only for publication in the contracting state where it has been applied for. It follows that these provisions are considered as prohibiting a licensee from having copies reproduced outside the territory of the contracting state granting the license. However, as explained in the Report of the General Rapporteur, Mr. Kaminstein who, I believe, will testify later in the day, this prohibition does not apply under certain carefully defined conditions; in other words, "The contracting state granting the license has within its territory, no printing or reproduction facilities or such facilities exist but are incapable for economic or practical reasons of reproducing the copies."

(5) Both Articles Vter and Vquater state that "due provision shall be made at the national level to ensure" that compulsory licenses provide for "just compensation that is consistent with standards of royalties normally operating in the case of licenses freely negotiated between persons in the two countries concerned."

REVISION OF ADMINISTRATIVE AND FINAL CLAUSES

The administrative and final clauses of the UCC were also revised. Among the more important changes were the suspension of the Berne "safeguard clause" for developing countries, and an increase from 12 to 18 countries in the membership of the important Intergovernmental Copyright Committee. In addition, UNESCO was asked to continue to serve as the Secretariat for that committee.

TWO PROTOCOLS IN REVISED UCC

The two protocols in the revised UCC correspond in effect to the two protocols of the 1952 Convention. Protocol 1 relates to the application of the convention to works of stateless persons and refugees, and Protocol 2 concerns the application of the convention to the works of certain international organizations.

SIGNING OF CONVENTION

At the conclusion of the UCC revision conference, which lasted some 3 weeks, 26 states signed that convention, including the United States and other developed countries such as the United Kingdom, France, the Federal Republic of Germany, Italy, Sweden and Japan. Subsequent to the conference, four additional states signed the Convention.

COMPULSORY LICENSING PROVISIONS

During the past year some concern has been expressed about the compulsory licensing provisions of the Paris revision of the UCC. In this connection I would wish to point out that the concept of compulsory licensing in the revised UCC is by no means a new one. A provision for compulsory licensing for translation rights has been an integral part of that convention since its negotiation in 1952. To the best of our knowledge, the right to a compulsory license has never

been invoked in any UCC member state. Instead, acceptable terms have been worked out between the interested parties without recourse to a compulsory license. It is not possible, really, to draw any firm conclusion from this past experience but at least it suggests the possibility that compulsory licensing may not be resorted to on any widespread basis in the future under a revised UCC.

PARALLELISM BETWEEN NEW TEXT OF UCC AND BERNE CONVENTION

As I have previously noted, one of the basic purposes of the diplomatic conference in Paris was to effect revision of the Berne Copyright Convention parallel to that of the UCC. In this connection, the Stockholm Act of Berne was replaced by the new Paris Act. Although the substantive copyright changes adopted at the Stockholm Conference were repeated without any changes in the Paris Act, the special exceptions for developing countries contained in the Stockholm Protocol were replaced by an appendix to the Paris Act of the Berne Convention. Taking into account certain differences in structure between the Berne Convention and the UCC, these exceptions follow very closely the exceptions in the revised text of the UCC. Once the Paris Act of Berne comes into force, a country may not ratify or accede to the Stockholm Act of 1967 and the protocol. Because of the continuing concern of U.S. copyright interests about the protocol, this, as far as we are concerned is a definite plus for the United States. In this connection, it should be noted that one of the conditions for the entry into force of the new Paris Act is that France, Spain, the United Kingdom and the United States become bound by the revised text of the UCC.

The parallelism between the new text of the UCC and Berne was carefully devised in order to give developing countries the option of staying in the Berne Convention. Further, the parallelism was designed to maintain the equilibrium between the two conventions.

RATIFICATION OF REVISED UCC IN NATIONAL INTEREST

The Department of State and other interested agencies believe strongly that ratification of the revised UCC is indeed in the national interest. The principal and overriding reason for this position is the one that I have mentioned. If the legitimate needs of developing countries for access to foreign copyrighted materials are not satisfied, then these countries may well exercise their sovereign right to denounce their international treaty commitments. Once they do this, they can, of course, quite legally reproduce or translate any and all copyrighted materials they desire without authorization regardless of the use to which they are to be put, and without the requirement of making any compensation. They can, in fact, go even further by exporting such materials to other countries. If such a situation occurs, it will mark the end of the international copyright system with resultant adverse effects on the interests of all U.S. copyright proprietors abroad.

There is now clear evidence that such action is seriously being studied in a developing country which is a party to both copyright conventions. We have been informed by our Embassy in Pakistan that on May 8, 1972, the Pakistan Minister of Education announced that his country was considering withdrawing from the Universal

Copyright Convention and the Berne Convention. As a result of consultation between U.S. Embassy officials and officials of the Pakistan Ministry of Foreign Affairs and the Ministry of Education, we have determined that the primary reason for considering withdrawal is dissatisfaction with the two copyright conventions that are now presently in force. However, the Pakistani officials consulted have indicated their satisfaction with the revised UCC and Berne Conventions. They are concerned, nontheless, that many years may pass before these conventions will be ratified by a sufficient number of states so that they can go into effect; and, as I have noted above, four specific countries, including the United States, must ratify the revised UCC before the revised Berne Convention can enter into force. In effect, Mr. Chairman, we have somewhat of a veto power over Berne in this way even though we are not a party to Berne. I would be very surprised if there are not other developing countries that share the concern of Pakistan.

REVISED UCC CONSTITUTES FAIR AND JUST COMPROMISE

We know that there may be certain articles in the revised UCC which do not entirely satisfy everyone, but the negotiation of an important convention with a large number of states in attendance involves give and take. It is the Department of State's belief that the revised UCC constitutes a fair and just compromise between the developed countries that produce the bulk of copyrighted materials and the developing countries that wish to use these materials for educational and research purposes on the best possible terms.

VIEWS OF PRIVATE COPYRIGHT GROUPS

During the preparatory work for the revision of the UCC the Department of State and the Copyright Office consulted with the principal U.S. private copyright groups through the State Department's International Copyright Advisory Panel to obtain their views on the proposed revision. Because of the diverse nature of these copyright groups, there were divergent views on some of the key points of the proposed revision. In the development of the U.S. position for the diplomatic conference, all views were carefully considered and we believe that we were successful in arriving at a position that was balanced and fair.

The product of the conference—the revised Universal Copyright Convention—has been carefully studied by the interested private copyright groups in this country and has met with widespread approval. Following I might list a few of the organizations which have endorsed U.S. ratification of the proposed revised UCC:

American Bar Association; American Patent Law Association; American Society of Composers, Authors and Publishers—ASCAP; Association of American Publishers; Broadcast Music, Inc.—BMI; Music Publishers Association of the United States, Inc.; National Association of Broadcasters; National Music Publishers Association; Recording Industry Association of America; Ad Hoc Committee of Educational Organizations and Institutions on Copyright Law Revision—National Education Association.

Of these organizations, I would like to mention specifically the American Bar Association and the fact that the ABA's House of Delegates believed the question of early U.S. ratification of the revised Universal Copyright Convention was important enough to be considered at an extraordinary session in February of this year.

EARLY RATIFICATION RECOMMENDED

We believe that it is a matter of consequence for the United States to be among the first to ratify the revised Universal Copyright Convention. One major developed country, the United Kingdom, whose publishers and authors have as much at stake as their American counterparts, has already ratified the UCC. It is well known that the United States played a very active part not only in the negotiation of the revised Universal Copyright Convention, but also in the initiation of this project and, indeed, in the initiation of the UCC itself. For this and other reasons that I have mentioned, early ratification of the UCC by the United States would be consistent with our leading role in behalf of international copyright protection and would advance our basic foreign policy objective of more effective protection abroad for the intellectual property rights of American nationals.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Ladd.

(Prepared statement of Mr. Cary follows:)

STATEMENT BY GEORGE D. CARY, REGISTER OF COPYRIGHTS BEFORE THE SENATE FOREIGN RELATIONS COMMITTEE WITH RESPECT TO THE UNIVERSAL COPYRIGHT CONVENTION AS REVISED AT PARIS ON JULY 24, 1971 (EXECUTIVE G, 92D CONGRESS, 2D SESSION)

I am George D. Cary, Register of Copyrights.

Mr. Chairman and members of the committee, I am very pleased to appear before this committee to represent the Library of Congress and the Copyright Office in support of ratification of the revised Universal Copyright Convention signed at Paris, France on July 24, 1971, by the United States and 25 other member countries. The revised Convention has now been submitted by the President of the United States to the Senate for its advice and consent prior to ratification. The Library of Congress and the Copyright Office completely and unreservedly urge ratification of the revised Convention. It is not necessary to revise the United States copyright law in any way to implement this Convention.

BACKGROUND OF THE U.C.C. REVISION

The Universal Copyright Convention was established twenty years ago through the efforts of the United States and other countries, many of which already were members of the Berne Convention, as a simple, low-level protection convention that would accommodate diverse legal systems and countries who were unable or unwilling to join the Berne Union. Unquestionably, adherence of the United States was essential if the new convention were to succeed. The United States did ratify the Universal Copyright Convention. It came into effect on September 16, 1955. The United States has assumed a leadership role in the operation of this Convention. Since we have not entered the Berne Union, the Universal Copyright Convention remains the primary vehicle for protection of American intellectual property (e.g., literary, artistic, and musical works) in foreign countries.

Since the establishment of the U.C.C., developments in the international field have led to a crisis situation in international copyright. As new nations emerge from the former colonial empires, a viewpoint developed that copyright presented a significant impediment to cultural and educational growth in developing countries. During the last decade, developing countries have pressed vigorously their belief that the present international copyright regimes should be modified to permit easier access to copyrighted materials in order to foster the cultural and educational growth of their people.

In 1967, the developing countries ostensibly obtained significant concessions within the Berne Union when special provisions were incorporated in a Protocol Regarding Developing Countries, which constitutes an integral part of the Stockholm Revision of the Berne Convention. The substantive provisions of the Stockholm Revision, including the Protocol, however, have not entered into force. Once free from the concentrated diplomatic pressures of the Stockholm Conference, the governments of most developed countries came to the conclusion that the concessions granted the developing countries were too great. It became obvious that the Protocol would not generally be accepted in developed countries. The developing countries alone could have entered the necessary ratifications to bring the Protocol into force, but, because of a provision insisted upon by the United Kingdom [Article 32 of the Stockholm Act], such a course was futile. The Protocol cannot be applied to works originating in countries that do not ratify the Stockholm Act or formally accept application of the Protocol.

When it became apparent that the Stockholm Protocol would not be accepted by developed countries, the developing countries turned to the Universal Copyright Convention and pressed for revision of that Convention. They particularly pressed for abrogation of the "Berne safeguard clause" in the U.C.C. so that it would be possible for Berne member developing countries to denounce their obligations under the Berne Convention without incurring the penalty set by the "Berne safeguard clause" in the U.C.C., which is loss of U.C.C. protection in countries that belong to both Conventions. The international copyright atmosphere also reverberated with threats to denounce both major international conventions and to rely upon an "outlaw" status to obtain the desired access by their people to the cultural heritage of the world community.

Neither "naked" revision of the "safeguard clause" nor denounciation of both international conventions would be beneficial to authors' interests or to the developing countries, at least in the long run. Fortunately, cooler heads prevailed. The developing countries are genuinely interested in remaining within the international copyright regimes and in affording protection for their authors and foreign authors.

The United States assumed a leadership role and was instrumental in abating the crisis. We took the initiative in proposing an international copyright study group which could reflect carefully and calmly about the way out of the crisis for developing countries, developed countries, and the authors of both groups. The International Copyright Joint Study Group met in Washington in the fall of 1969 and a framework for a solution was agreed upon. The so-called Washington Recommendation of the Study Group called for simultaneous revision of the Universal Copyright Convention and the Berne Convention to accomplish the following goals: abrogation of the "safeguard clause" in the U.C.C. in favor of developing countries; separation of the Stockholm Protocol from the remainder of the Stockholm Act; inclusion of the minimum rights of reproduction, public performance, and broadcasting in the U.C.C.; inclusion of special provisions for developing countries in the U.C.C.; and links between the two major Conventions permitting Berne member developing countries to apply the special exceptions in their favor in relations with other Berne members.

Several preparatory meetings followed this Washington meeting, and the Berne Convention and the U.C.C. were revised, in accordance with the Washington Recommendation, at the Paris Diplomatic Conferences in July 1971.

SALIENT PROVISIONS OF THE REVISED U.C.C.

The revised Universal Copyright Convention represents the culmination of several years of careful, patient negotiation and hard work by representatives of developed and developing countries. In this country, the private sector was consulted and informed at each step of the way toward revision of the Convention. In the context of the past five years in international copyright, the revised U.C.C. must be viewed as beneficial to the interests of authors generally. From the perspective of the Stockholm Protocol, it should be clear that the Paris Diplomatic Conferences of 1971 reversed an apparent "anti-copyright" trend at the international level and turned the thoughts of the international copyright community toward protection of authors' rights, notwithstanding the concessions to developing countries. The excesses of the Stockholm Protocol have been eliminated. The concessions are reasonable and will permit compulsory licensing with respect to the translation and reproduction rights only with appropriate safeguards and restrictions regarding the purpose of the use.

Specification of Minimum Rights.—The revised U.C.C. for the first time specifically includes the minimum rights of reproduction, public performance, and

broadcasting. These rights are mentioned in a new Article IV*bis*. Previously in the U.C.C. there was only the general obligation to provide "adequate and effective protection of the rights of authors," and a seven year period of exclusive translation rights. Specific mention of the rights of reproduction, public performance, and broadcasting is not imitative, nor is it necessary for any present member of the U.C.C., including the United States, to amend its copyright law as a condition of adhering to the revised Convention. We do have the obligation, under the revised Convention, of according a "reasonable degree of effective protection to each of the rights" specifically mentioned and, although exceptions are permitted, the exception should not "conflict with the spirit and provisions" of the revised text. We are fully confident that our present copyright law enables us to fulfill the obligations of the new Article IV*bis*. We believe that the specification of additional minimum rights can only benefit authors.

Abrogation of the "Safeguard Clause."—The present "safeguard clause" in the 1952 U.C.C. text makes the Berne Convention predominant over the Universal Copyright Convention in the case of relations between two countries that are members of both conventions. The clause also carries the penalty mentioned previously for denunciation of the Berne Convention: loss of U.C.C. protection in Berne-U.C.C. countries. Article XVII and the Appendix Declaration are amended in the revised text to remove the penalty for denunciation of the Berne Convention, in the case of developing countries. This amendment would have no effect on the United States because we are not a member of the Berne Convention. The "safeguard clause" is of significance only to Berne members.

Special Exceptions for Developing Countries.—The revised text includes new Articles V*ter* and V*quater*, permitting compulsory licensing by nationals of developing countries under certain conditions with respect to the rights of translation and reproduction.

Article V of the present text already permits translations under compulsory licenses seven years after publication, unless the author has published a translation in a particular language for which a compulsory license might be requested. In the more than fifteen years of experience with these provisions, the compulsory license has been resorted to rarely, if ever.

Experience under this provision suggests that the detailed compulsory licensing mechanism established under the revised text may be resorted to only in the event that voluntary licensing agreements fail.

Authors and copyright proprietors can foreclose the issuance of any compulsory licenses by effecting publication of the work within specified periods from first publication during which they enjoy exclusive rights. In the case of the translation exception, under Article V*ter* the author can stop compulsory licenses by publication of a translation in the particular language within three years of first publication in the case of translation into a "world language," or within one year in the case of all other languages. Under the reproduction exception, the exclusive right periods are longer, giving the authors more time to decide upon publication in developing countries. The periods are: seven years for works of fiction, poetry, music, and drama; three years for works of the natural and physical sciences and mathematics; and five years for all other works. The work must be published in a given developing country within the exclusive right period at the usual price for comparable works in that country.

Even after compulsory licenses have been issued, the exclusive right can be recaptured by effecting publication in the developing country at any time in the case of reproductions. The comparable provision for translations is complicated by the existing compulsory licensing mechanism of Article V, but the exclusive right can be recaptured by publication of the translation within seven years of first publication and even beyond that time if the prospective licensee does not utilize the present Article V system.

In order to grant compulsory licenses to their nationals, the developing countries must establish specific procedural mechanisms. Compulsory licenses may be granted only for limited purposes. Translation licenses are permitted only for purposes of "teaching, scholarship or research." Reproduction licenses are permitted only for "systematic instructional activities." Compulsory licenses can be issued only after the national of the developing country has contacted or attempted to contact the author or proprietor to negotiate voluntary licenses. The proprietor therefore will have notice and can arrange for a publication in the developing country which would forestall any compulsory license, or he may of course agree to a voluntary license.

In addition to the procedural safeguards spelled out in the revised text, the Report of the General Rapporteur by former Register of Copyrights, Abraham L.

Kaminstein, contains many authoritative interpretations that further limit the circumstances under which compulsory licenses may be issued. For example, if the copyright owner makes a reasonable offer to grant a voluntary license, the prospective licensee's refusal to accept the terms cannot be used as a basis for granting a compulsory license. Also, if the copyright owner files a list of the works he owns with the competent authority in the developing country, an applicant for a compulsory license must first contact the owner to negotiate a voluntary license; he cannot claim that he is unable to contact the owner.

If the procedural barriers are hurdled and compulsory licenses are issued, the author is entitled to a "just compensation that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned." Further, developing countries are obligated to assure transmittal of payment, or, if national currency regulations intervene, the competent authority shall make all efforts by the use of international machinery to insure payment in world convertible currency.

If compulsory licenses are issued, they operate essentially only within the territory of the granting authority. Export of copies produced under compulsory licenses will not be permitted, subject to very limited circumstances. One exception permits export, under severe restrictions, to nationals of the developing country who are living abroad. A more important "exception" does not appear in the text. It appears as an interpretation in the Report of the General Rapporteur. The interpretation would permit a developing country that lacks printing or reproduction facilities or whose facilities are incapable for economic or practical reasons of reproducing the work in question to grant a license allowing the licensee to have the editorial and reproduction processes done abroad. All copies must be returned in bulk for distribution only within the given developing country. The Report emphasizes that in all other cases the editorial preparation and reproduction must be done in the licensing country.

ADVANTAGES OF THE REVISED U.C.C. OVER THE STOCKHOLM PROTOCOL

In discussing the U.C.C. revision, it is pertinent to point out the advantages of this revision over the Stockholm Protocol. Let me briefly contrast a few of the provisions of the Protocol that have been eliminated or modified in favor of author interests in the revised U.C.C.

Of prime importance is the complete *elimination* of the Protocol's "catch all" provision permitting any use of copyrighted works for purposes of "teaching, study and research," at nominal compensation or none at all.

The Protocol contains special exceptions for broadcasting that have not been carried over into the revised texts of the Berne and Universal Conventions.

In the case of translations and reproductions, the purposes for which compulsory licenses can be issued have been tightened. The translation exception in the Protocol has *no* purpose limitation. Under the revised U.C.C., use is permissible only for "teaching, scholarship or research." The reproduction exception applies to rather broad areas encompassed by "educational and cultural purposes" under the Protocol, in contrast to the revised U.C.C. formulation of "systematic instructional activities."

Export of copies produced under the translation and reproduction exceptions of the Protocol is not prohibited at all. Export is essentially prohibited under the revised U.C.C.

The right to compensation for translations is not assured under the Protocol throughout the life of the copyright. This right is assured under the revised U.C.C.

Except for works of the natural and physical sciences and mathematics, the Protocol contains a shorter exclusive right period with respect to reproductions than the revised U.C.C.

Other technical improvements over the Protocol relate to the procedural requirements and the notice requirement (if the original work bore notice of copyright).

IMPORTANCE OF RATIFICATION BY THE UNITED STATES

The revised text of the Berne Convention contains an unusual condition. Unless the United States, France, Spain, and the United Kingdom ratify the revised U.C.C., the Berne revision cannot come into force. This condition was included at the request of the developing countries to assure them that the developed countries would not once again, as in the case of the Stockholm Protocol, refuse to follow through and ratify the special provisions for developing countries in the revised Conventions. Moreover, if the revised Berne text does not come into

force, the real danger is that the developing countries may denounce both conventions and resort to international literary piracy, which would adversely affect U.S. authors and publishers.

We believe that the revised U.C.C. represents a reasonable accommodation of divergent interests. The developing countries have legitimate need for access to copyrighted works. At the same time, the developing countries must protect the interests of their own authors and publishers. Compulsory licenses should be kept to a minimum and authors should in any case be compensated. We believe that these objectives will be achieved through the revised U.C.C. A number of U.S. groups interested in copyright also approve of these objectives. In addition to the American Bar Association, whose House of Delegates approved the ratification of the U.C.C. in special urgent proceedings at its Mid-Winter meeting this year, the following organizations have also signified their endorsement of ratification:

American Patent Law Association.
American Society of Composers, Authors and Publishers (ASCAP).
Association of American Publishers.
Broadcast Music, Inc.
Music Publishers Association of the U.S. Inc.
National Association of Broadcasters.
National Music Publishers Association.
Recording Industry Association of America.
Ad Hoc Committee of the National Educational Association.

As to compulsory licensing it was a foregone conclusion that such concept would be included in the revised U.C.C. As far as the United States is concerned, it should be noted that the U.S. copyright law of 1909 pioneered the concept with our compulsory licensing scheme for recordings of musical compositions. In the interest of authors' rights, the developed countries sought and achieved a large number of conditions on the grant of compulsory licenses. Copyright owners will receive royalties for any compulsory licenses. Authors are given an opportunity to prevent compulsory licenses by publication of the translation or the reproduction in the particular developing country. The exclusive right once lost may be regained under certain circumstances.

The concessions made to the developing countries represent the minimum that those governments have indicated they need to meet the enormous educational needs of their people.

If the United States fails to ratify the revised U.C.C., the Berne revision will not come into force. Developing countries may well denounce any international copyright obligations and resort to "Taiwan" type literary piracy. The resulting loss of faith resulting from the failure of the U.S. to ratify the revised U.C.C. would severely diminish, if not nullify, any leadership role of the United States at future meetings on intellectual property. The contours of the new crisis in international copyright cannot be clearly perceived, but, if such a crisis develops, neither the interests of the United States generally nor the cause of authors' rights would be well served.

We have reached a reasonable compromise that balances the legitimate needs of developing countries and the rights of authors and publishers throughout the world and in this country. I strongly urge approval of the revised U.C.C. by the Senate.

The CHAIRMAN. Mr. Winter or Mr. Cary, do you wish to make a statement in addition before we ask questions?

COUNTRIES WHICH RATIFIED REVISED UCC

You noted the United Kingdom had ratified. How many countries have ratified the revised Universal Copyright Convention?

Mr. LADD. Only the United Kingdom has ratified.

CONTINUED EXISTENCE OF BERNE CONVENTION

The CHAIRMAN. As revised it will then be the only convention. What happens to the Berne Convention? Does it continue in existence?

Mr. LADD. Very definitely; the Berne Convention is really the grandfather convention.

The CHAIRMAN. The grandfather; this does not supplant it?

Mr. LADD. The revised UCC does not supplant it, but what we have done here is revised two conventions simultaneously——

The CHAIRMAN. Yes.

Mr. LADD (continuing). So as to provide easier access to the copyrighted materials for developing countries, the rights being equal in each of the two conventions.

DEFINITION OF A DEVELOPING COUNTRY

The CHAIRMAN. What is the criterion for a developing country? What do you mean by that?

Mr. LADD. An excellent question and one that was dealt with at great length at Paris in July. It is very difficult to come up with a specific definition of a "developing country," as we learned at the conference. The decision regarding a country's level of development is considered, to be properly left up to that country.

This is so because there is no single criterion that applies to all countries in all contexts, and only those countries themselves can determine whether they are not, in fact, in a developing status.

I believe there is a provision in the revised UCC whereby this declaration by the country that it is in a developing status must be renewed every 10 years so that it prompts a reconsideration of this status.

We are not too concerned at this point that countries that are not legitimately regarded in world opinion and common parlance as "developing countries" will claim developing country status for the purpose of this convention. We believe that by acceding to the convention that they will undertake their responsibilities seriously and they will fulfill the obligations of this convention.

The CHAIRMAN. Let me approach it differently. How many countries have now ratified this revised convention?

Mr. LADD. Just the one, sir.

The CHAIRMAN. The UK?

Mr. LADD. Just the UK.

The CHAIRMAN. On the orginal UCC, how many countries were there? Did you say forty-five countries had ratified?

Mr. LADD. I believe that it is 61.

The CHAIRMAN. Of those, how many had claimed to be developing countries?

Mr. LADD. Under the existing—the original—1952 UCC, we have not had these additional rights of exceptions for developing countries and thus there has been no need under the original UCC to claim that status.

The CHAIRMAN. Is there any way you can indicate even an estimate of how many are developing countries?

Mr. LADD. I think we could answer that.

The CHAIRMAN. These are questions that I know probably will be asked and often are asked in the course of the debate or consideration. I would like to have some kind of an answer on the record of what is a developing country.

Mr. LADD. Excuse me, Mr. Chairman——

The CHAIRMAN. Go ahead.

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Mr. LADD. I think what we can do is indicate a list of UCC member countries today which could potentially avail themselves of the exceptions provided in the revised UCC.

The CHAIRMAN. All right. What would it be?

Mr. LADD. If you wish, I could indicate some of those countries.

The CHAIRMAN. I was really interested in the proportion. Could you name some of them and say about how many there are?

Mr. LADD. It appears to me, sir, there are roughly 20 to 30.

The CHAIRMAN. Twenty out of the 60, about?

Mr. LADD. It would be about 30 based on the current membership of the 1952 convention.

U.N. CRITERIA FOR DETERMINING DEVELOPING COUNTRY

The CHAIRMAN. My attention is called to Article Vbis which says, "Any contracting state regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations may, by a notification deposited with the Director General of the United Nations Educational, Scientific and Cultural Organization at the time of its ratification, acceptance or accession or thereafter, avail itself of any or all of the exceptions provided for in Articles Vter and Vquater."

So in the United Nations General Assembly there is apparently some criteria for determining whether a country is developing or not; isn't there?

Mr. LADD. Yes, sir.

The CHAIRMAN. That is the measure by which it could be determined here; is that right? You accept that basis?

Mr. LADD. This specific proposal was made to follow the U.N. General Assembly criteria.

The CHAIRMAN. Yes.

REVISED UCC BROADER THAN U.N. DEFINITION OF DEVELOPING COUNTRY

Mr. LADD. In Paris. it was felt, however, that it might be too constraining and I believe I am correct in saying that the definition of a developing country, as under the revised UCC, generally may be a little broader than only those that may be construed as developing by the U.N. General Assembly practice.

The CHAIRMAN. It would include all of those plus some others, if they chose to exercise the right. Is that the right way to put it?

Mr. LADD. Yes, that is correct.

SOVIET UNION NOT PARTY TO BERNE OR UCC?

The CHAIRMAN. Did the Soviet Union sign the UCC?

Mr. LADD. No, sir. The Soviet Union is not a party to either one of the two major conventions.

The CHAIRMAN. Either Berne or UCC?

Mr. LADD. Yes, that is correct.

ATTITUDE OF SOVIET UNION

The CHAIRMAN. What has been their attitude? Have they ignored all rights of authors?

Mr. LADD. Up to this point, apparently the Soviet Union has decided that it has more to gain by not belonging than it has by belonging to one of the international copyright conventions. I am reminded that it was not until 1955 that the United States adhered to an international copyright convention, the UCC.

The CHAIRMAN. What's that?

Mr. LADD. The United States did not belong to any copyright convention.

WHY UNITED STATES DIDN'T BELONG TO BERNE CONVENTION

The CHAIRMAN. Is that why we didn't belong to the Berne Convention?

Mr. LADD. No, not entirely.

The CHAIRMAN. Why was it?

Mr. LADD. We did not belong to Berne because of the very complex nature of our own domestic copyright law, which, as you may know, has been under constant study now for a number of years. We simply cannot qualify for membership in Berne at this stage because of our domestic law. We do not have certain provisions that countries must have in their domestic law to adhere to Berne.

SOVIET UNION'S ATTITUDE TOWARD UCC

Now, as far as the Soviet Union is concerned, we have discussed the subject with them. I think they are more interested today. It is my understanding that this was one of the subjects that the Joint U.S.-U.S.S.R. Commercial Commission discussed recently, and that the Soviet Union is looking with renewed interest on the possibility of adhering specifically to the UCC.

DOES TAIWAN BELONG TO UCC?

The CHAIRMAN. Does Taiwan belong to the UCC?

Mr. LADD. No, sir. We would be anxious to have them join the UCC.

WHY TWO CONCURRENT CONVENTIONS?

The CHAIRMAN. I am not right clear why there are these two conventions in the copyright field—the Berne and the UCC. I don't have a very great background on it. My first question is, why, when you negotiate a new one, doesn't it sort of occupy the field? Why do you have two concurrent ones—the Berne and the UCC and now the Berne and revised UCC? Why is that?

Mr. LADD. An excellent question. I think that the best answer is that the Berne Convention provides higher standards of protection for its member countries and is, therefore, most desirable from a copyright proprietor standpoint. Because the United States in its domestic

law could not meet those standards, the UCC was created in 1952 and came into effect in 1955 primarily to accommodate the United States.

U.S. INABILITY TO CONFORM TO BERNE CONVENTION

The CHAIRMAN. I didn't understand that. What is so peculiar about our domestic law that we could not conform to the Berne Convention?

Mr. LADD. I might refer to the Register of Copyrights on the question and within the constraints of time. Mr. Cary, if I may, would you care to answer that?

Mr. CARY. Thank you.

Very briefly, Senator, the United States has been trying to get its law changed in order to become a member of the Berne Convention ever since the mid-20's, but none of these attempts were ever successful.

The CHAIRMAN. You mean the Congress wouldn't go along or what?

Mr. CARY. No, sir.

The CHAIRMAN. What was the reason?

Mr. CARY. Well, there were several reasons. Basically, there is a philosophical difference between the concept of copyright in the United States and the concept that exists in Europe. In Europe, for example, copyright is looked upon as being something that is a product of the author's mind and should be protected automatically; whereas, in this country, the concept is that this is a privilege given to an author by the Congress and in order to exercise that privilege he has to give a little *quid pro quo*. Now, one of these *quid pro quos* that I mentioned is what we call the formalities.

The CHAIRMAN. What?

Mr. CARY. Formalities. You have to put a copyright notice in a certain place in the work and you have to register it, and you have to manufacture it in this country and so forth. You don't have that in the European concept. So until we can get these provisions in our law out of the law, we really cannot adhere to the Berne Convention and so far we have been unsuccessful.

The CHAIRMAN. Did you try?

Mr. CARY. Oh, yes, since——

The CHAIRMAN. What happened to the effort?

Mr. CARY. They were all nullified; nothing ever came of it.

The CHAIRMAN. By the Congress?

Mr. CARY. It never passed.

The CHAIRMAN. You submitted laws——

Mr. CARY. Yes.

The CHAIRMAN (continuing). Requiring this and they were defeated——

Mr. CARY. That's right.

The CHAIRMAN (continuing further). Or failed of passage in the Congress?

Mr. CARY. Yes.

The CHAIRMAN. Going back to the 1920's?

Mr. CARY. That's right. The present copyright bill, which is pending in the Senate now, contains enough changes in it that it should go a long way toward permitting us to adhere to the Berne Convention, but until that is done, we have to rely for our international protection on the UCC. That is why there are these two conventions.

OPPOSITION TO MAKING UNITED STATES CAPABLE OF JOINING BERNE CONVENTION

The CHAIRMAN. I am curious. Who opposes the enactment of your proposal to make us capable of joining the Berne Convention?

Mr. CARY. Well, to give you——

The CHAIRMAN. The publishers or authors or who?

Mr. CARY. As I remember it, back in the 1920's it was primarily, at least one of the leading opponents, was the motion picture interests because there is a doctrine, which the Europeans have, which we do not have in our law or our concepts, of the moral right. This is a right that an author has to be recognized as the father, as it were, of his work, and the right to require that if any modification of his work is made, this is done with his permission. The motion picture interests at that time, as I understand it, felt that when they purchased the right to produce a work on the stage or in the motion pictures, that they then had the right to modify the story to any degree that they considered necessary without obtaining the permission of the author. So, they naturally opposed the legal recognition of the concept of moral rights. That is one of the problems we faced in considering joining the Berne Convention.

Then, of course, as I said, there were these formality problems which people just didn't want to change. There were such things also as the duration of copyright. In the European concept the duration of copyright usually is made dependent upon the author's life and so many years after his death; whereas, this country has historically always maintained a period of years.

The CHAIRMAN. What is that period now?

Mr. CARY. It is 28 years for a copyright; and if you renew it, you get another 28 years, making a total of 56 years.

Mr. LADD. Under the Berne Convention, the rule is the author's life plus 50 years; so there is a basic difference there in the tenure of the copyright itself.

The CHAIRMAN. So it was the movie industry that objected primarily?

Mr. CARY. I don't say they were the main ones.

The CHAIRMAN. You did say that. Well, I misunderstood you.

Mr. CARY. They were one of the main ones, sir.

The CHAIRMAN. Who was the main one? Who else objected?

Mr. CARY. Well, there was the problem of the manufacturing clause and the labor unions were against modification of it because they felt that it provided protection for them. I think they still do.

The CHAIRMAN. Are they still this way? Are they still opposing any changes?

Mr. CARY. The last time this came up was some years ago when we ratified the UCC in 1955, and they still had the same feeling, although they did adhere to a concept of amending the manufacturing clause to a degree, but they still did not want to give it up.

The CHAIRMAN. I see.

REVISED UCC BEST WE CAN DO UNDER CIRCUMSTANCES

Am I right in saying this? This revised UCC is the best we can do because in view of these other circumstances we cannot become a member of Berne. Is that correctly describing it?

Mr. LADD. Yes, sir, that is a very fair analysis. I might say we are not entirely unprotected even under Berne because there is what is sometimes referred to as the "backdoor Berne." I wrote a book in 1968, Senator, and dedicated it in part to you and it was published simultaneously in Canada. Canada is a member of Berne and therefore books published in Canada enjoy Berne protection as well as UCC protection. We would like to do better than that. We would like not to take advantage of "backdoor" Berne and be a full-fledged member, but, as Mr. Cary has pointed out, until our archaic domestic copyright law, which goes back to 1909, can be revised, we can't belong to Berne. A revised copyright bill has been passed by the House.

YEARS OF PROTECTION CARRIED BY REVISED CONVENTION

The CHAIRMAN. I see. What years of protection does the revised convention carry—the same as the United States—28 years?

Mr. LADD. Yes, the term has not been changed in the revised UCC. The original UCC provides for 25 years for a country like the United States which computes the term of protection from the date of first publication. This was set up to come under the U.S. 28-year term of protection.

Mr. CHAIRMAN. Subject also to extension, another 25 years?

Mr. LADD. It requires that as a minimum a state like the United States wishing to join the UCC has to provide a term of at least 25 years. Now, such a state, of course, is welcome to renew it, but that is up to the sovereign state to do that.

SETTLEMENT OF DISPUTE UNDER CONVENTION

The CHAIRMAN. What if a dispute arises under this convention? How will it be settled?

Mr. LADD. There is a provision for the International Court of Justice to receive such disputes. Article 15 makes direct reference to the Court. However, we do have other remedies for disputes, principally negotiations in good faith between the parties involved, diplomatic exchanges between the countries, and the good faith interests of those who adhere to the convention. Finally, if it becomes quite clear that there are defects in these revisions, we can consider further revisions in the convention itself.

IS CONNALLY AMENDMENT OVERRIDDEN?

The CHAIRMAN. If we ratify this, do we, in effect, accept the jurisdiction of the International Court? Would this, for example, override the Connally reservation which was attached to the original "accession"—if I may use that word in quotes—to the International Court?

Mr. LADD. I answer that with some trepidation in that I am not a copyright lawyer and international lawyer, nor in fact a lawyer. I might read Article 15, very briefly, which says that:

> A dispute between two or more contracting states concerning the interpretation or application of this convention, not settled by negotiation, shall, unless the States concerned agree on some other method of settlement, be brought before the International Court of Justice for determination by it.

We can look into that for you.

The CHAIRMAN. This is a type of question that could be asked and it has been controversial—not with me. I think I am the only member of the Senate still living or still present in the Senate who voted against the Connally amendment. In any case it arises every now and then and I wish you would put a positive answer in the record for it. I think that it would override it.

Mr. LADD. Yes, sir.

The CHAIRMAN. I am not saying that it offended me at all, but just simply on the record that it would override it.

Mr. LADD. We will supply that for the record.

The CHAIRMAN. I think that would be an agreement by us explicitly to accept the jursidiction in these cases in spite of the Connally reservation. That is the way I look at it, but I think you ought to put that answer in the record.

Mr. LADD. We will, sir.

(The information referred to follows:)

ARTICLE XV OF UCC AND CONNALLY RESERVATION

Supplied by Department of State

Article XV of the Universal Copyright Convention provides for submission to the International Court of Justice of disputes between Contracting States concerning the interpretation or application of the Convention, unless the Parties involved agree on another means of settlement. This provision is not affected by the reservation attached to the United States' acceptance of the Court's compulsory jurisdiction under Article 36(2) of the Statute of the Court of International Justice, since it is a separate and independent basis for the Court's jurisdiction.

MEANING OF NOT PERMITTING RESERVATIONS

The CHAIRMAN. Article XX provides that "Reservations to this convention shall not be permitted."

What do you mean by that, that the Senate should take it or leave it? Is that what that means, that we cannot put any reservations on this?

Mr. LADD. That is my understanding, yes, sir.

The CHAIRMAN. It is your understanding we take it as is or reject it? Is that correct?

Mr. LADD. That is correct.

NO EFFECT ON U.S. DOMESTIC COPYRIGHT LAW

The CHAIRMAN. Does this convention have any effect upon our domestic copyright law, the one to which you have already referred?

Mr. LADD. No, sir; it does not. It does not require any implementing legislation or additional legislation, and so far as we can tell; it does not in any way interfere with a domestic law that should be interfered with.

The CHAIRMAN. Should be interfered with? You are going to have to interfere with it by more direct means. Is that what you are saying?

Mr. LADD. That's right.

The CHAIRMAN. You are not trying to change these laws by treaty process——

Mr. LADD. That's correct.

The CHAIRMAN (continuing). I assume, because you thought that might run into difficulties, too, and it probably would?

Mr. LADD. Yes, sir.

BILL PENDING IN SENATE

Mr. CARY. May I interpose, Senator, there is a bill presently pending in the Senate which has been there for some years which will rectify or correct a lot of these inequities. As soon as the Senate Judiciary Committee reports out that bill, we will be very happy to have your support of it.

The CHAIRMAN. How long has it been before the Judiciary Committee?

Mr. CARY. Well, it has been there for a couple of years, primarily on one point, namely, the matter of cable television; and with the recent agreement which was announced by the White House and by the FCC, their new rules, we have some hope that maybe this will get unstuck and get along its way.

The CHAIRMAN. Is this that question of the FCC taking jurisdiction over cable television?

Mr. CARY. That has something to do with it.

The CHAIRMAN. That having been more or less settled, then you think the cable television people would withdraw their objections?

Mr. CARY. Senator McClellan, who is chairing the subcommittee that is handling this, has indicated that it is a little late in the session now to start doing anything about it, but he will, the first thing next year when the new Congress comes into session, attempt to get this out of the Senate next year.

The CHAIRMAN. Good.

Do you have any questions, Senator Percy?

Senator PERCY. I have for Mr. Ladd.

The CHAIRMAN. All right, proceed.

Senator PERCY. They may duplicate, Mr. Chairman, other questions you have asked, and if they do, I hope you will say so.

The CHAIRMAN. They can indicate.

IMPROVED LEVEL OF PROTECTION FOR U.S. COPYRIGHT HOLDERS

Senator PERCY. I would like an explanation as to how the revised Universal Copyright Convention improves the level of protection for American copyright holders.

Mr. LADD. There are additional rights, Senator, that had not previously been in the UCC which are included as a result of these revisions.

The purpose of the revision, of course, was to provide certain exceptions for developing countries for educational purposes. The UCC has been strengthened by the introduction of certain basic rights of authors, including the exclusive right to authorize broadcasting, public performance and reproduction by any means—that is, an author has a right to authorize those means, broadcasting, public performance and reproduction. The existing UCC only refers to the rather vague provision of "adequate and effective protection." It did not refer specifically to these basic rights.

It might be noted that in providing special exceptions for developing countries, the UCC was updated to meet the economic and political realities of the times. As such it should prove to be a far more viable instrument in every respect.

Senator PERCY. Are the American authors and publishers going to be worse off or better off economically with respect to the developing countries under the revised convention?

Mr. LADD. I feel I might leave that question to the publishers' and authors' representatives who will be testifying here this morning

Senator PERCY. What is your judgment and what have they advised you? Have they told you they are going to be worse off or better off or will there be no change?

Mr. LADD. We believe that the revised UCC will strengthen the position of authors and copyright proprietors. Specifically, within the framework of the Convention what we are trying to do, Senator, is to preserve the entire international copyright system as we know it today.

It has been in great jeopardy since 1967 because of the Stockholm Protocol. The whole intent and purpose behind the revised UCC was to put the pieces back together and preserve an effective, coherent system of copyright. We believe that is accomplished and the authors and copyright proprietors will be benefited

HAVE DEVELOPING COUNTRIES BEEN HARMED BY PAST CONVENTIONS?

Senator PERCY. In your opinion, have developing countries been seriously harmed by past copyright conventions?

Mr. LADD. Have developing countries been harmed?

Senator PERCY. Yes.

Mr. LADD. I don't believe you can say that developing countries have been harmed by the copyright conventions. They are receivers and users of copyright material rather than producers. I think what we are trying to do here is to help them by providing exceptions under the conventions for developing countries.

DEVELOPING COUNTRIES' CONSIDERATION OF BOLTING CONVENTIONS

Senator PERCY. I had heard that some developing countries seriously considered bolting from the existing conventions unless some concessions were made to them which certainly would have been injurious to publishers and authors. Is this true?

Mr. LADD. This is true.

Senator PERCY. Did you feel there was a serious chance they might have bolted and not been a part of future conventions?

Mr. LADD. Very serious. It is much more than rhetoric or international politics. I alluded in my prepared statement to the situation we have right now with Pakistan where it was indicated that this Government was intending to withdraw from both the major conventions. We undertook discussions with them. We explained that the new provisions under the revised UCC and Berne would appreciably assist them. Pakistan is now in a "wait-and-see" posture to see whether or not the United States and some of the other key developed

countries, are going to move ahead expeditiously with adherence to the revised UCC as has the United Kingdom. If we can do that, I think they will be satisfied and I think we will preserve the international copyright system.

DEFINITION OF DEVELOPING COUNTRIES AND EDUCATIONAL ACTIVITIES

Senator PERCY. Critics of the convention who have contacted my office have argued that the definition of what a developing country is and what educational activities are under the revised convention are simply too vague.

In your testimony or in your colloquy with the chairman, have you clarified those particular phrases or terms so that they are not subject to misinterpretation?

Mr. LADD. I believe we have, Senator. Simply put, while there may be—as lawyers are prone to disagree from time to time—some concern that these terms are not specific enough, within the framework of trying to deal with 60 or more countries in an international convention of this kind, I think we have achieved what is a very fair and balanced conclusion.

ADEQUACY OF CONSULTATION WITH PUBLISHERS AND AUTHORS

Senator PERCY. During the course of our negotiations, were you in adequate consultation with publishers and authors so that their input could be reflected in our negotiating terms? I am particularly concerned with compulsory licensing, on which I have some very definite opinions.

Mr. LADD. The answer is affirmative. Not only did we consult at great length with the State Department's Advisory Panel on Copyright and with the Copyright Office and other governmental agencies, but we also had one of the largest delegations at the Paris Conference—about 25 members. Among those delegates were several members of our Advisory Panel on Copyright including a representative of the publishers' interests, Mr. Robert Frase who is the Executive Director of the American Association of Publishers.

We were in constant, daily, if not hourly, contact with these copyright interests in Paris as we revised the UCC.

OTHER BENEFITS OF REVISION OF UCC AND BERNE CONVENTION

Senator PERCY. What other benefits can you visualize, Mr. Ladd, coming from the simultaneous revision of the Universal Copyright Convention and the Berne Convention? For instance, is it possible that some of the Asian countries might ratify who now sanction book piracy or that you might be able to induce more countries to come in as a result of this? Are there other benefits that might flow from it?

Mr. LADD. This is part of the object to make the convention, without watering down its basic protection, to make it more palatable, more acceptable, to those countries who have not acceded to either one of the two conventions.

Because the standards for UCC are lower, I think it is more likely that countries not now party to either one will be inclined to accede to the UCC. If you have in mind the case of Taiwan, where there has been and I suppose continues to be some book piracy, that is almost

an exception. They have made apparently a decision to continue to permit unauthorized reproduction of copyrighted works.

I might say though that through negotiations with Taiwan, while we have not succeeded in getting them to adhere to the convention, we have succeeded in getting them to agree not to export. There is a law now in Taiwan and, so far as we can tell, it is being effectively policed—not to export the books that they are reproducing in that country without permission.

EFFECT OF REFUSAL TO APPROVE RATIFICATION

Senator PERCY. Lastly, I think you have by your testimony and comments clearly pointed out some of the advantages. However, on the other side of the coin, what would be the effect upon authors and publishers if the Senate of the United States refused to approve ratification of copyright convention?

Mr. LADD. I would say that the impact would be most unfavorable. I must allude again to the fact that we are struggling here to maintain an international copyright system. The Pakistan case may be a good case in point. Unless the major developed countries can evidence good faith and show that they do believe in these conventions that were negotiated in July 1971 and put them into effect through ratification, then the developing countries will consider very seriously leaving the conventions that they are now party to. The result of that, of course, would be that you would develop not just one Taiwan but many. I think that would have a most dire impact on all of the authors and publishers of this country.

Senator PERCY. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Ladd.

The next witness is Mr. Irwin Karp.

Senator JAVITS. Mr. Chairman, before you call the next witness, may I have a word.

The CHAIRMAN. I only point out we only had one witness and we used an hour and a half. We will not begin to make our record.

Senator JAVITS. Mr. Chairman, normally I would have the authority to question a witness, but I shall waive that. I just wish to state I have a very profound interest in this convention. It involves a tremendous number of publishers and authors in my home city and home state, and I just wish to, as quite a few of their representatives are here, state my interest and that I shall take very profound note of what they have to say and how they wish to see this thing handled in the hope of being able to serve the general purpose of worldwide protection in respect of publication, including the Communist countries where I know there is an enormous problem.

Thank you, Mr. Chairman.

The CHAIRMAN. I didn't mean the Senator would not have an opportunity to ask questions. We have a number of other witnesses. Mr. Karp from New York, counsel for the Authors League of America, is the next witness. I am sure in the process of their testimony I would yield my time to the Senator from New York and he can say all he wishes.

I was simply trying to move along. The last witnesses were representatives of the State Department and we have examined them at

length on their attitude toward this, as to the effect of the agreement. The Senator from New York will have all the time he wishes for these other witnesses. In fact, several are his constituents; in fact, most of them. He can expound at length.

Senator JAVITS. I shall not.

Senator PERCY. If Mr. Ladd were not from Illinois, I would extend all my time. He is a very fine constituent.

The CHAIRMAN. Mr. Karp?

Thank you, Mr. Ladd. That was a very, very good presentation.

Mr. Karp is the counsel for the Authors League of America.

Mr. Karp, you have, I believe, quite a lengthy statement. Would it be possible to insert that and to summarize it for the committee because we are running out of time?

STATEMENT OF IRWIN KARP, COUNSEL, THE AUTHORS LEAGUE OF AMERICA

Mr. KARP. Yes, Mr. Chairman. It was not my intention to read the whole statement, only to summarize part of it.

The CHAIRMAN. We will put your whole statement in the record.

Mr. KARP. I appreciate that.

The CHAIRMAN. And if you would point out the critical questions that arise in the minds of your clients——

ONE-WAY STREET IN REVISED UCC

Mr. KARP. Mr. Chairman and members of the committee, the 1971 convention would revise the present Universal Copyright Convention essentially in only one respect: it would allow so-called developing countries to publish works of foreign authors in translations or in the original language without the author's consent and without the publisher's consent, and at a royalty fixed by the government or agency of that licensing country. It does this by adding to the present convention a whole new series of provisions concerning compulsory licensing.

On the other hand, the developed countries would continue to give full copyright protection to authors from all countries and would not be able to adopt such systems.

I say that only by way of contrast. The last thing in the world we would want is for any country, especially a developed country, to do this, but this is a one-way street.

UPGRADED PROTECTION OF AUTHOR'S RIGHTS QUESTIONED

It has been suggested, and I deal with this much more fully in the statement I have submitted, that additional benefits are secured by the convention, particularly the upgrading of protection through certain references to authors' rights. I must say that that is essentially semantic window dressing, that really accomplished nothing. All that that article of the convention does is to specify that the general statement of rights already there in the convention is understood to include the rights of reproduction, of public performance and broadcast.

Most people would have agreed that they are there anyway and that is borne out by the report of the convention which emphasizes

that any member nation at present need not change its law at all in order to comply with this new section. In other words, the present law of any member country is good enough. So if something new had been added that couldn't have been logical.

The new article does not change what is now in the convention and only some words are added to make it a little more palatable; and then the words are followed with a caveat that every country can make exceptions to those rights if it chooses.

So what may have been given with the left hand would have been taken back with the right.

PURPOSE OF CONVENTION

But in any event, that is hardly the purpose of the convention. The whole purpose of the convention was to set up a compulsory licensing system.

EFFECT IF CONVENTION IS NOT RATIFIED BY UNITED STATES

If the convention is not ratified by the United States, I should point out, that would not be the end of our membership. We would just continue to be bound by the 1952 convention; we would not have to have our authors' works exposed to the new regulations of the 1971 convention.

The CHAIRMAN. Could I ask a question there?

PROBABILITY OF DEVELOPING COUNTRIES WITHDRAWING FROM CONVENTIONS

The preceding witness stated that they were faced with the probability of certain developing countries withdrawing from the Berne Convention and the UCC, in which case he thought it would be much worse than this convention. What do you say to that argument?

Mr. KARP. Well, Mr. Chairman, first of all, my statement points out that The Authors League and other private organizations don't have any effective means of determining that; nor do we have the means, which only the Congress of the United States has, for taking measures to counter it. Such measures could have been taken and have been taken in the past. That is the only reason we don't oppose ratification. We don't support it because this is a bad convention; we don't support it because we don't want to be in position of being accused by people in the future of having caused this exodus which we don't know will occur or will not occur, and which we can't prevent.

All we can do is call to the committee's attention the reasons why we think the new convention is inequitable and potentially very injurious, and answer some of these arguments—which I am going to do—in answer to your question. And we also recommend to the committee, that if the Senate decides after reviewing the record thoroughly, that on balance it should ratify, then it take certain action in connection with the ratification that would mitigate some of the damages which this convention may cause.

Coming back to your specific question, the threat that countries would leave the Universal Copyright Convention or the Berne Convention was first voiced—and did not occur—in 1967 or 1968 after the

Stockholm Protocol was rushed through by the developing countries, and then no developed country would ratify it. Because they recognized with horror how silly they had been, they wouldn't ratify the piece of paper they had signed at Stockholm. Whether developing countries will leave is problematical or which ones would do it. In fact, one of the things we think the Senate should do before it decides on ratification is to have the State Department find out, because we have heard rumors that some of these countries are threatening to leave in any event. Certainly it would be sort of a futile waste and futile destruction of our rights to have the Senate ratify the treaty, to have the U.S. ratify, that is, and then find some of the developing countries have nonetheless departed.

So our first recommendation, really, is that the Senate learn what these countries intend to do. As Mr. Ladd has testified, only Great Britain has ratified so far and it would be imprudent for us to take this irrevocable step to find out that many of them are going to leave anyway.

Secondly, we think that you have to balance the advantages and disadvantages of nations leaving this convention. The developed countries which are the major markets for many American publishers and authors are not going to leave and have not threatened to leave. It is certain of the developing countries who may. Now, many countries don't belong to the convention right now; it is of no great consequence to us——

The CHAIRMAN. There are 61, I believe he said, who belong.

Mr. KARP. Yes.

The CHAIRMAN. Taking the United Nations, what are there now, 130 members?

Mr. KARP. I believe approximately that.

The CHAIRMAN. It is not quite half, I guess?

Mr. KARP. That's right.

FREEDOM IN DETERMINATION OF DEVELOPING COUNTRY

If some of the developing countries leave, it is very likely they will come back and they will come back to a convention that hasn't been weakened by this revision. If they stay in, the convention will have been weakened for probably a hundred years because every country is essentially free to determine whether it is developing or not. There are no U.N. standards; that should be made very clear. That is another case of semantic window dressing. The U.N. has no established practice. It has different lists of developing countries for different purposes.

The CHAIRMAN. Give me an example.

Mr. KARP. Well, the Committee on Assessments has a standard of $300 per capita annual income. Several of the countries that claim to be developing, that led the fight for the new convention, several of the countries in that category, like Brazil—not Brazil—I will come to Brazil separately for other reasons—Argentina, Israel and other countries that are listed have per capita incomes well above $300. In fact, some of them have per capita incomes well above per capita incomes of countries that the State Department seems to think are developed countries.

Secondly, several of the countries that will claim to be developing countries have publishing industries that far outproduce the publish-

ing industries of developed countries or those we thought were safely in the developing category. Several countries that claim to be developing, and here we come to Brazil, have some of the largest military budgets in the world. Brazil last year had an annual military budget of $792 million, the largest in South America.

I cite in my statement a report from the New York Times on Brazil's purchase of the remaining equipment required for one squadron of Mirage fighters last year, total cost, $100 million.

Now, I simply can't accept as a matter of commonsense a country that can afford to spend almost $1 billion a year on national defense as a developing country for the purposes of this convention.

The CHAIRMAN. Mr. Karp, they can't afford it. We urge them to do it by our policies of arms sales. A lot of these countries can't afford it, but we make it possible by grants and long-term concessional loans and high power pressure for them to buy our arms. You know that.

URGING VOLUNTARY LICENSING ROUTE SUGGESTED

Mr. KARP. Senator, I know that and one of the things we recommend is for a very modest—I would submit—microscopic sum we could urge them to go the voluntary route, and help them go the voluntary route, on the licensing of the rights of American authors. In the last fiscal year when Brazil was spending that $792 million, the U.S. Information Agency which does act as a voluntary conduit between publishers and other countries, especially developing countries and the United States, in negotiating licenses and paying license fees to American authors, that agency spent a grand total of $83,000 on this project. For $830,000 you could pay all the royalties in the world probably for the next 10 years for all American authors in those developing countries that really couldn't do it themselves.

SUBSIDY INVOLVED IN TREATY

What this treaty involves is really a subsidy. We have no basic objection to subsidies to developing countries, truly developing countries. The only trouble with this treaty is that it asks the author and publisher not only here but in other countries to pay the subsidy by having his rights appropriated at a royalty that is bound to be lower.

Compulsory licensing royalties are always lower; it is always bound to be lower than the fair value of what is taken and what could have been negotiated.

The CHAIRMAN. What is an example?

Mr. KARP. I have a letter from Mr. Fanget who used to be head of the Publications Division of the U.S. Information Agency which he wrote to us last year in connection with the program where the U.S. Information Agency pays royalties in, say, Asia, $100 for ten thousand copies or less, $200 for more than ten thousand; that is voluntary, and authors are willing to accept that per country.

On the other hand, he says, the rights in the noncommercial languages bring less than in the commercial languages; it is often difficult for American publishers or authors to sell rights in most of the Asian languages directly to the foreign publishers; and the latter expect, sometimes expect, to pay as little as $25; often they are not able to pay in dollars at all. One of the defects of this treaty is that it writes

that right into the compulsory license clause, as an exception to the obligation to pay. And I have a hunch the compulsory license royalty is going to be closer to the $25 than the $100 or $200 or $300 in that type of country.

This treaty writes into that provision the exception that the royalties have to be paid subject to currency control which means an automatic opportunity for most countries who do not want to pay anything to block even the meager pittance that they may fix.

QUESTION OF DEVELOPING COUNTRIES' LEAVING

Therefore, Senator, summarizing in response to your question, some of these countries may leave. You have got to balance against that the fact that if we ratify the treaty you will have for the next fifty or one hundred years this level of protection will be lower in probably much more than half of the membership of the UCC at present and perhaps as much as three-quarters.

I have estimated that every Asian, African, Middle Eastern, South American country can qualify because it is its own judge of its status, and only a handful of European countries, the United States and Japan may end up being developed countries.

I might also point out that, as we noted in the statement, many developed countries who in good faith intended to treat themselves as such under this convention, have a perfectly legitimate right to call themselves developing because by almost every standard—per capita income, size of publishing industry, ability to finance a defense establishment—they are more poorly situated, economically, than countries like Brazil, Argentina, Israel, Yugoslavia and others who claim to be "developing."

So what you are faced with is the prospect that you might have 80, 90 or 100 countries saying they are developing countries who can do this under this treaty now or as they come in. Therefore, our second recommendation to the committee is that before the Senate consents to ratification it should ask the State Department to take a reading, and ask these other countries what they intend to declare themselves as.

We did ask Mr. Ladd, in a letter some months ago, for that information and he was very kind to tell us that he didn't have it but would try to get it. I have not heard since and I understand he sent out some inquiries. But I do think that the Senate should make a more official request for the State Department to find out which of these countries are going to come in claiming they are entitled to establish compulsory licenses and which will claim they are not.

The CHAIRMAN. I tried to ask him that a moment ago. I don't know how important he thought it was. He indicated he thought it was about 30, or between 20 and 30.

Mr. KARP. He gave me a list just in terms of marketing, from a U.N. study on marketing, where 31 or 32 are on the list and that does not include all of them by any means; that was half the membership right now.

The CHAIRMAN. That was his estimate?

Mr. KARP. Yes. Going by the per capita standard and others you can get more. And then as I point out there is no standard. It

just says in accordance with the practices of the U.N., which do not exist as a specific practice and without a specific definition.

The CHAIRMAN. Senator Javits, do you have any questions?

Senator JAVITS. No, thank you. I think I have the picture very well.

Mr. KARP. Mr. Chairman, I might point out just one or two other points.

SUGGESTION THAT LICENSES WON'T BE ISSUED

It has been suggested this is all a tempest in a teapot and these licenses won't be issued. Well, the obvious answer to that is, first of all, if they are not going to issue them, why change the treaty?

CUT DOWN IN TIME PERIOD OF LICENSE

Secondly, too many countries fought too hard to cut the time period down from 7 years to either 3 or 1, and that is the crucial issue here. One year after—or 3 years after publication—a translation license becomes much more useful. And, as a result of some last minute changes, which I have described in the statement, changes which we objected to bitterly but without success, it becomes very profitable for developing countries to make use of these licenses. They can use a single translation; they can go outside their own borders, each one, and have the thing mass-produced in Taiwan—not in Taiwan but in a member country. If Taiwan joined it could then go into business printing for the developing countries under compulsory licenses which is a very nice arrangement commercially because you don't have to pay royalties at the same level.

NO REAL PROTECTION FOR AUTHORS AND PUBLISHERS

This treaty, with a system of compulsory licensing, as I point out in the statement, provides no real protection for authors and publishers; they just can't defend against them.

ORGANIZATIONS SUPPORTING TREATY NOT AFFECTED BY IT

I might also point out while a long list of names was read off of organizations supporting the treaty, you can understand why they do; they are not affected by it. The only people this treaty is aimed at, and will affect, are authors and publishers of books and literary material like magazine articles, primarily books, and those people who produce audio-visual materials used for systematic instruction. Music publishers are not affected. The developing countries don't even care about it. Records stayed out; they are not subject to compulsory licensing under this treaty. The motion picture industry is all right too; it is not affected either. So, therefore, feeling they have nothing to lose by the treaty and worried about the possible exodus of some developing countries, their attitude is, "I am all right, Jack, so I am for ratification."

They are not concerned about authors and publishers as such.

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BASIS OF ABA ENDORSEMENT

The ABA which also endorsed ratification of the treaty, did so on the basis of a skimpy report which I think in only three lines of three pages, three lines dealt with the crucial issue; and the membership of the House of Delegates was advised that "certain changes" are made in the compulsory licensing provision, nothing said about the loopholes, nothing said about the weaknesses. And members of the ABA, some of whom are present in this room, who opposed ratification or had serious questions, never participated in any debate, never even knew about it, actually. I don't think that type of endorsement of a convention really is worth much.

CONSIDERATION OF RECOMMENDED STATEMENT OF PRINCIPLES URGED

I think much more important is the study of the treaty and of these possible weaknesses and possible consequences. And I would earnestly urge the committee to consider the recommendations we have made at the last page of our statement for a statement of principles by the Senate, in the report of this committee or in the resolution should it decide to ratify it. I think that if the Senate makes clear to those countries the United States may well pull out of the UCC itself if they abuse this convention, or if developed countries proclaim themselves as nations entitled to compulsory licenses, or if they didn't set up a system for prompt and easy arbitration of disputes between authors and licensing authorities, I think this may have some effect. But I do say that serious defects of this treaty deserve your earnest consideration before you reach a decision.

I want to thank you very much for hearing me.

(Mr. Karp's prepared statement follows:)

STATEMENT OF IRWIN KARP, FOR THE AUTHORS LEAGUE OF AMERICA

The Universal Copyright Convention as Revised in Paris on July 24, 1971

Mr. Chairman and Members of the Committee, my name is Irwin Karp. I am attorney for the Authors League of America, a national society of professional writers and dramatists. The President has asked the Senate's advice and consent to ratification by the United States of the "Universal Copyright Convention as Revised in Paris, on July 24, 1971". I appreciate this opportunity to testify for the Authors League on this question.

If ratified, the 1971 Convention would revise some of the provisions of the 1952 Universal Copyright Convention ("UCC") of which the United States is a member. The principal changes would permit any "developing" country in the UCC to grant compulsory licenses to translate or reproduce books by authors of other member nations without their consent, and at royalties fixed by the licensing country. Since there is no definition of a "developing" country, each member will be free to determine its own status; and many countries with established publishing industries and large military budgets would make these unauthorized uses of books by American authors, at government-fixed royalties. However, the United States and other developed countries would have to continue granting full protection to authors from all UCC members, and could not adopt such systems.

The 1971 Convention would thus downgrade the level of copyright protection now required of members of the 1952 UCC, which contains a far more limited translation clause. The new convention must be ratified by the United States to subject American authors to these compulsory licensing systems in other countries (and to make effective the 1971 Berne Convention revision, which contains identical compulsory licensing clauses). Without U.S. ratification, American authors would continue to be protected under the 1952 UCC.

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THE POSITION OF THE AUTHORS LEAGUE

The Authors League does not ask the Senate to approve ratification of the 1971 UCC because of its serious inequities. Nor does the League oppose ratification, for reasons discussed below. The League does wish to call attention to these inequities; and to urge that if the Senate decides for ratification, it ground its consent on a statement of principles that would reduce abuses of the Convention and mitigate the injury its compulsory license system could cause authors here and in other countries, developed as well as developing. The League also suggests that the Senate should have information as to the intentions of other UCC members on ratification before it reaches its decision.

THE INTEREST OF AUTHORS

Authors will bear the brunt of the damages caused by the new compulsory licensing provisions. While American publishers of text and technical books license foreign publications of these works, the authors receive a substantial share of the income. American authors of general trade books (as distinguished from texts and technical works) receive most or all of the income from translations and foreign publication of these works. These authors have far more to lose from the compulsory licensing system than do their American publishers.

It should be emphasized that authors of books will be the principal victims. Some organizations representing creators or distributors of movies, music and other non-literary works are unconcerned by these dangers. The reason is simple. Their members are not affected. If the licensing provisions had included these non-literary media, the list of organizations endorsing ratification would have been shorter.

THE INEQUITIES OF THE COMPULSORY LICENSING PROVISIONS

In his closing remarks, the Chairman of the Revision Conference said that the system of compulsory licensing would not satisfy the "world of authors" in the developed or developing countries; and he expressed the hope that compulsory licenses would be an *exception* and not the ordinary means of providing for the publishing of foreign authors' books in developing countries. He recognized that a compulsory license appropriates an author's work without his consent, and for a government-fixed compensation that may be inadequate. Indeed the scheme of the 1971 Convention recognized that the compulsory license provisions were a retreat from accepted principles of international copyright protection, allowing only the "developing" countries to appropriate authors' rights in this fashion, and requiring developed countries to give full protection to those rights.

The rationalization for the compulsory license provisions was that "developing" countries could not always afford to pay royalties under voluntary agreements. Actually, the provisions require authors and publishers to subsidize publishing and education in these nations by involuntarily contributing their literary rights for inadequate compensation. The Authors League pointed out that it was unfair for the cost to be borne by writers and publishers rather than by the governments of the United States and other developed nations. American manufacturers of aircraft, arms, soft drinks or other products are not compelled by compulsory licenses—to contribute their products to developing countries which need, but cannot afford to pay the prices asked for, these products. The subsidies in these cases are provided by the United States. Certainly the modest amounts required to subsidize the payment by developing countries of fair translation and reproduction fees to American authors could be provided by the United States. And these amounts could still be provided, by increasing the appropriations of the United States Information Agency which now pays fees to U.S. authors for licensing rights to publishers in these countries.

During the drafting of the 1971 Convention, the Authors League and other organizations consulted with the Department of State and The Copyright Office. While pointing out the basic inequity of the compulsory licensing approach, we suggested provisions that would preserve for authors a modicum of protection if such a system were adopted. Some of these were adopted. We were told that others would be impossible to "sell" to the developing countries. Whether they could have been adopted if more vigorously pressed in the drafting stages, we do not know since the League and other organizations did not participate in this work. The final draft of the 1971 convention which emerged from the drafting committee of the UCC was hardly one that, in the words of the Conference

Chairman, would satisfy the world of authors. But, as spokesmen for the developed countries emphasized in their opening speeches at the Paris conference, the final draft was a package deal which could not be tampered with, at the risk of disturbing the "delicate balance" reached by the drafting committee.

Nonetheless, the developing countries forced through changes in the text which further weakened the protection of authors against the damaging effect of compulsory licenses. Moreover, several nations who could not realistically be considered "developing" for the purposes of the UCC, made it clear they intended to claim that status, thus greatly increasing the number of countries which might appropriate authors rights under the compulsory licensing provisions.

THE LOOPHOLES IN THE LICENSING PROVISIONS

(1) The 1952 UCC allows any member to grant a non-exclusive license to translate a book into its language if an authorized translation has not been published within 7 years. The final draft of the 1971 UCC provided that for purposes of teaching and scholarship, a developing country could issue compulsory licenses for translation into languages generally used in developed countries after 3 years; and into other languages, after 1 year. However, this provision was amended on the floor to shorten the 3 year term to 1 year if the developed countries using the language agree. Only English, French and Spanish are excepted. Thus Brazil, by agreement with Portugal, will be able to grant compulsory licenses to translate American books into its language within the shortest time period.

(2) In the final draft, compulsory licenses for translation could be issued "only for the purpose of teaching, scholarship or research"; and compulsory licenses for reproduction of a book (in its original language or authorized translation) could be granted only "for use in connection with systematic instructional activities." These phrases were intended to limit the scope of compulsory licenses; and minimize their impact. However the developing countries were able to dilute the effect of these limitations. The Report of the UCC conference (its "committee" report) states that "scholarship" refers not only to activities in schools "but also to a wide range of organized educational activities intended for participation at any age level and devoted to the study of any subject." The Report also said that the phrase "use in connection with systematic instructional activities"—which was to limit reproduction licenses—"is intended to include not only activities in connection with the formal and informal curriculum of an educational institution but also systematic out-of-school education".

Moreover, the statements of developing country delegates for the record, unchallenged by delegates from developing countries, set the stage for an overbroad interpretation of both phrases that would permit the public sale of compulsorily-licensed translations and reproductions so long as they had some tenuous connection with "education"; for example, inclusion on the reading list of an adult education course, or a radio or television lecture series.

(3) We had understood that if a developing country granted a compulsory license, the printing or reproduction had to be done within its boundaries. This placed a natural limit on the amount of licensing. And this limit was actually inherent in the proviso that such licenses be valid only for publication in the licensing country, since the 1952 UCC defines "publication" to include the reproduction as well as the distribution of copies. Under pressure from the developing nations the Conference adopted a binding interpretation in the Report which stated that while "ordinarily" a licensee could not have copies reproduced outside the licensing country, this limitation does not apply where the country does not have printing or reproduction facilities, or its facilities "are incapable for economic or practical reasons of reproducing the copies." Each developing country will be its own judge of these factors. The interpretation also declares that a license may use a foreign translator; and that several developing countries can use the same translator.

These changes multiply the dangers of compulsory licensing. They allow several developing countries to issue compulsory licenses for the same work, use one translator, and have the work reproduced in quantity in another UCC or Berne country with modern facilities. As a result, they can obtain mass production and low costs; and the added advantage of paying lower royalties than they would have paid under a voluntary contract with the author. Thus compulsory licensing becomes an even more attractive alternative to voluntary arrangements between an author and developing countries that want to use his book. Despite the hope of the Conference Chairman, compulsory licensing may become the rule, rather than the exception.

THE EXPANSION OF THE "DEVELOPING COUNTRY" CONCEPT

Even more disturbing than these last minute changes in the allegedly inviolable "package deal" was the ominous evidence that compulsory licensing would be used far more widely than had ever been anticipated. The principal argument for the 1971 UCC had been that India, Pakistan, the emerging African nations and other truly developing nations needed this form of subsidy. But on the floor of the Paris Conference it became apparent that many countries in the UCC who are not "developing" in this context will nonetheless claim this privileged status, and the power to make unauthorized uses of foreign works under a compulsory license system. The 1971 UCC defines a developing country as one so regarded "in conformity with the established practice of the U.N. General Assembly." There is no explicit "practice" or single list of "developing countries." The U.N.'s Committee on Assessments has considered developing countries as those with per capita income of $300 or less. But many countries at the Paris Conference resisted proposals that this or any other specific criteria be written into the UCC or Berne Conventions. From a practical viewpoint, most members will be free to determine their own status.

Several of the present UCC members who may claim "developing" status and compulsory licensing privileges have annual per capita incomes well above the $300 figure: e.g., Argentina, Chile, Greece, Israel and Mexico. And there are others. Some of these have higher per capital incomes than other UCC members like Iceland, Spain and Portugal who have been considered safely in the "developed" category. (United Nations Statistical Yearbook, New York; 1971—pp. 597–601).

Several of the present UCC members who are likely to claim "developing" status have publishing industries that produce many more titles annually than do publishing firms in some "developed" countries. In 1968, Yugoslavia (a putative "developing" claimant) published twice as many titles as Norway and Canada, and many more than Belgium and Switzerland (all of whom, hopefully, will consider themselves "developed.") And Israel, Brazil and Argentina (who considered themselves "developing" at the Paris conference) each published many more titles than did Ireland, Andorra, Iceland or Monaco (who have usually been considered, until now, as "developed" nations) (UNESCO Statistical Yearbook, 1971). Argentina, Brazil, Israel, Yugoslavia and other potential claimants to developing country status have established publishing industries, and have negotiated licenses with American authors and publishers over the years. If they proclaim themselves "developing", they will be free to grant compulsory licenses to their for-profit and non-commercial publishers, on terms much more advantageous to them, and far more onerous to U.S. writers and publishers.

Many UCC members who are likely to claim developing country status and compulsory licensing privileges are well able to support very sizeable military establishments, at a cost of hundreds of millions of dollars annually. For example: On May 21, 1972 the New York Times reported that Brazil—which considers itself a "developing nation for UCC purposes—announced the purchase of a $59 million traffic control and radar system" bringing the cost of equipping the country with one squadron of French-built Mirage jet fighters to over $100 million." The Times said that in 1970 Brazil had a defense budget of $792 million. Argentina, Columbia, Peru and Venezuela have also purchased Mirage fighters, said the Times, and their defense appropriations have increased 348% between 1940 and 1970. All of these countries are likely to claim "developing country" status under the UCC for compulsory licensing purposes. We respectfully submit that they are capable of paying the modest royalties called for under voluntary licensing arrangements with U.S. authors and publishers.

In light of the loose interpretation of "developing country" successfully asserted by some nations at the Paris conference, it is not certain how many present (or future) UCC members might claim that status. Mrs. Bella Linden, attorney for two major publishers, estimates that more than 80 present members might do so. And in view of the loose interpretation, practically every South American, African, Middle Eastern and Asian nation (except Japan) might place itself in the "developing" category. Indeed, some of the European "developed" countries with lower per capita income, smaller publishing output, or slighter defense budgets might conclude they had as much right as Yugoslavia, Brazil, Israel or Argentina to be considered "developing" for UCC-compulsory licensing purposes.

The Authors League asked the State Department which UCC members had designated themselves, formally or informally, as "developing" under the 1971 Convention. It did not have the information and has sent inquiries to its posts

in some of the countries which might make the claim. We believe that before reaching a decision on ratification, the Senate should have the Department determine, to the fullest extent possible, which UCC members will claim they are developing countries. Otherwise the United States may discover, after it has taken the irrevocable step of ratification, that only this country, Japan and a mere handful of Western European nations will give full protection to authors rights, and not indulge in compulsory licensing of translations and reproductions. If compulsory licensing were limited to truly developing countries, the damage to authors might be mitigated to some extent. If several other UCC members also claim that privilege, widespread injury to authors is likely.

THE CONSEQUENCES OF THE COMPULSORY LICENSING SYSTEM

(1) Proponents of ratification assure authors that few licenses will be issued. If so, there would be no reason to tamper so drastically with the fabric of international copyright protection. We believe that many countries fought to reduce the period for issuing translation licenses from 7 years to 1 year (3 years for world languages), and to establish the reproduction license, because they intend to grant such licenses extensively. Moreover, the last minute changes which allow outside (and cooperative) printing and translation make compulsory licenses cheap and attractive. And the likely increase in the number of self-proclaimed developing countries portends a larger number of compulsory licenses than might have been anticipated.

(2) Proponents of the 1971 Convention say that authors can prevent compulsory licenses by publishing authorized translations. But authors and publishers cannot afford the substantial expense of translating a book into several languages simply to prevent compulsory licenses. They need an audience in that language and a publisher in the foreign country who is willing to issue the book. These are exactly what the compulsory licensing system may deny them. Since an applicant for a compulsory license is not required to use it within any time period, the author would never know if he was spending money to defeat a license that might never be exercised.

(3) While the 1971 UCC allows an author to terminate a license by issuing an authorized edition in the licensing country, it may be difficult to find a publisher in a country which owns or controls the publishing firms (or firm), including the one that has already issued the compulsory-license edition. Moreover, the authorized edition must be sold at a price related to that charged for comparable works; and that price may be near, at or below cost—if comparable works are sold by a state owned or subsidized publisher.

(4) It is also contended that authors are protected because the compulsory license cannot be granted unless the author's or publisher's authorization for a license is requested and denied. But this brings us to the basic inequity of a compulsory license system. It is inevitable the author will be offered a royalty lower than he would obtain in free and voluntary negotiations. He is under the gun. If he refuses the applicant's offer, the applicant can obtain a compulsory license at a royalty fixed by its government (and the applicant may even be an agency of that government). No minimum royalties are specified in the Convention; and if the author is not satisfied with the government-fixed royalty, he can only challenge it in the courts of that country, thousands of miles away. He cannot afford to do that. Nor can he afford to challenge, in that forum, any of the other determinations made by the licensing country, including its decision that it is entitled to exercise the outside printing privilege.

THE CONSEQUENCES OF NON-RATIFICATION

(1) Proponents of ratification claim that the 1971 Convention upgrades the level of protection in the 1952 UCC. Article I of the 1952 text requires member states "to provide for the adequate and effective protection of the rights of authors and other copyright proprietors". It remains unchanged in the 1971 Convention; and is supplemented by a new provision stating that these rights "include the basic rights insuring the author's economic interests, including the exclusive right to authorize reproduction by any means, public performance and broadcasting." But it is doubtful that this language (in Art. IV *bis*) adds much to the existing obligation to provide "adequate and effective" protection for authors rights. Moreover, the new article allows members to make exceptions to these rights "that do not conflict with the spirit and provisions of this Convention". Balanced against these slight improvements, if they be improvements, are

the new compulsory licensing provisions which constitute a serious downgrading of copyright protection under the UCC.

(2) The principal argument for ratification made by some, including publishers, is that despite the defects of the 1971 Convention, the consequences of non-ratification will be more harmful. They say that developing countries will leave the UCC and Berne and be free to use American works without compensation; and that these countries will also supply unauthorized copies to member countries. However many countries are free to do this now, since they do not belong to either Convention. Moreover the danger that departing developing countries would become copying centers is less of a threat then the possibility that China, the Soviet Union or other countries already outside the Conventions might do so. Actually authors of member countries including the U.S. will still have to rely for protection on the copyright laws of member countries, which prohibit the sale of piratical copies.

(3) On the other hand, if the 1971 UCC is ratified, the structure of international copyright protection will be eroded for decades. Any member which proclaims itself a developing country retains that status for ten years and can renew it for successive decades. If some of the countries we have referred to—with per capita income well over $300, large defense establishments and viable publishing industries—claim to still be "developing", consider how long it will take for less affluent nations to decide they have emerged from that status, and abandon compulsory licensing. Furthermore, if a country leaves the 1952 UCC or Berne because the 1971 Convention is not ratified, its authors will no longer be granted protection in other UCC countries. At some point the desire for that protection may persuade them to rejoin. But under the 1971 Convention, they are free to issue compulsory licenses, while their authors will continue to receive full protection in the developed countries, safe from the encroachments of compulsory licensing.

(4) Similar threats of a developing country exodus were made after the abortive Stockholm protocol, and never materialized. It is likely that if the 1971 UCC were not ratified some nations might leave the UCC. However the Authors League, and the other organizations representing copyright owners, are not in a position to determine which nations would depart. Only the government can determine that, and only the Congress possesses the power to take steps which might effectively counter such threats of withdrawal. Therefore it would be inappropriate for the Authors League to urge the Senate not to ratify the 1971 Convention; since we cannot accurately determine the consequences, and do not have the power to affect them.

(5) However, it is appropriate for us to note that there have been reports that Pakistan, the Philippines and other countries (India is among those mentioned) may not ratify the 1971 UCC even if the United States does, and might withdraw from the 1952 UCC despite U.S. ratification of the new convention. Since the purpose of the 1971 text, with its weakening of protection for authors, is to persuade developing countries to remain in the UCC—it would be pointless for the United States to ratify the 1971 Convention, only to see several countries then withdraw from UCC. Such an exodus would make U.S. ratification a futile sacrifice of authors rights. Therefore we believe that before the Senate reaches a decision on ratification, it should have the State Department determine whether the developing countries will remain in the UCC, and will ratify the 1971 text, if the U.S. does.

IMPROVING INTERNATIONAL COPYRIGHT RELATIONS

It has been argued that U.S. ratification of the 1971 UCC will improve international copyright relations and aid the education and culture of developing countries. We believe that U.S. can make far more positive contributions in these areas—and should do so whether or not it ratifies the Convention. Indeed, to ratify—which means that U.S. authors and publishers, not the United States, will be doing the subsidizing—and then take none of the meaningful steps that are required, would make ratification a hollow gesture.

The United States can improve international copyright relations and protection by finally eliminating from its Copyright Law those provisions which deny authors the protection granted them in Berne Convention countries (e.g., the manufacturing clause and the juke-box clause); and it can raise the level of U.S. copyright protection to the minimum standards required so that the U.S. can join the Berne Convention. It can do so by enacting the long pending Copyright Revision Bill, or by revising the few sections of the present Act that need improvement.

The United States can help developing countries improve their educational and publishing institutions by providing funds, through loans or subsidies, to establish viable publishing facilities in the developing countries. And it can help the truly developing countries acquire rights to publish American books—on a voluntary basis—by increasing the appropriations of the United States Information Agency so that it can expand its present program, acquire more licenses for developing country publishers when they request them, and pay adequate fees to American authors for these licenses.

RECOMMENDATIONS

(1) The Authors League respectfully recommends to the Committee that before the Senate reach a decision on ratification of the 1971 UCC, it should determine (i) whether any of the developing countries intend to withdraw from the UCC even if the United States ratifies; and (ii) which members of the UCC intend to claim developing country status.

(2) The Authors League also recommends that if the Senate decides for ratification of the 1971 UCC, it ground its consent on a statement of principles (in the Committee's report, or the Resolution), containing the following points:

A. The United States believes the purpose of the 1971 UCC was to make the compulsory license privilege available only to truly developing countries. That while there is no definition of the term in the Convention, the U.S. believes that nations with annual per capita incomes over a designated amount, publishing industries of a specified size, or defense budgets in excess of a stated figure, should not claim developing country status for UCC purposes. That if such UCC members do establish compulsory licensing systems under claim of that status, the U.S. will have to re-examine its relations with the UCC and the possibility of its withdrawal from the Convention.

B. The United States believes that, in the words of the Conference Chairman, compulsory licenses should be an exception and not the ordinary means of providing for publication of foreign works in developing countries. Therefore, the U.S. would have to carefully re-examine its adherence to the UCC if nations which established compulsory license systems did not design and administer them in a manner which permitted the maximum of voluntary bargaining, provided simple and effective means of redressing authors' grievances, and assured payment of adequate compensation to authors. In this connection, the U.S. would consider the failure of developing country publishers to make full use of the licensing program of the United States Information Agency before resorting to compulsory licensing, a breach of the spirit of the 1971 Convention.

C. The United States believes that the spirit of the Convention requires a nation to promptly terminate its developing country status for UCC purposes when it has emerged from that status.

D. The United States believes that UNESCO must make every effort to establish a realistic definition of "developing country"; establish a forum for the prompt determination of disputes between member nations on that issue, and others that may arise concerning the interpretation of the Convention; and that UNESCO must seek to establish a forum for the binding arbitration of disputes between authors and licensing nations (and authorities), in a simple and inexpensive manner, so that authors' rights cannot be frustrated and destroyed through lack of an effective means of protecting their rights against abuses of the compulsory licensing provisions.

The Authors League wishes to thank the Committee for this opportunity to present these views on the problem of ratifying the 1971 Universal Copyright Convention.

WITNESS' RECOMMENDATIONS

The CHAIRMAN. Thank you very much. In order that I understand it, you are recommending that in our report we take note of your recommendations and express our views, but you are not recommending we reject the convention; is that correct?

Mr. KARP. That's right, only for the reason that we just are in no position to determine, and we hope the committee will determine, which countries will actually refuse——

The CHAIRMAN. We will be glad to ask the State Department if they can do that. I am not sure whether they can or not.

Mr. Ladd didn't seem very optimistic about being able to determine that.

Mr. KARP. Well, Senator, this is, of course, one of the reasons it is hard for outsiders, even though we were consultants in some of these proceedings, to take final positions.

The CHAIRMAN. Yes.

Mr. KARP. I would think, in my humble opinion, that if these countries were informed that the Senate of the United States would like to know what position they are taking on the treaty and whether they intend to ratify it or not before the Senate decides, they would tell you.

The CHAIRMAN. What you want to know is whether they are going to take a position that they are a developing country?

Mr. KARP. That's right and whether they will ratify if we do.

The CHAIRMAN. Yes. Let's see what we can find out about it.

Mr. KARP. Thank you very much.

The CHAIRMAN. Thank you very much.

The next witness is Mr. Leonard Feist, Executive Vice President, National Music Publishers Association, New York.

STATEMENT OF LEONARD FEIST, EXECUTIVE VICE PRESIDENT, NATIONAL MUSIC PUBLISHERS ASSOCIATION

Mr. FEIST. Mr. Chairman, I would have submitted a written statement, and will delete in my oral testimony some of the material given by Mr. Ladd.

The CHAIRMAN. We will put your entire statement in the record and you can comment on it, if you please.

Mr. FEIST. Mr. Chairman and gentlemen, I am Leonard Feist, Executive Vice President of the National Music Publishers Association, Inc., the trade association of the publishers of popular music. I am also here on behalf of the Music Publishers Association of the United States, Inc., the trade association of the publishers of educational, church and concert music, an association of which I was at one time president. The membership of both associations includes nearly all the significant companies in their respective fields, large and small. Both have their offices in New York City.

I trust during the course of my statement, Mr. Chairman, I will make clear that the music publishing field does have valid and sincere concerns in the field of international copyright.

RATIFICATION SUPPORTED

I appear here in support of the ratification of the Paris Act of the Universal Copyright Convention of the United States. I believe that the ratification of this revision of the international copyright treaty to which the United States presently adheres is in the best interests of this country. This conclusion is based on long and frequently intense personal involvement in the process which finally resulted in the drafting and signature in Paris of the treaty presently before you for consideration.

STOCKHOLM PROTOCOL

It was my honor to be an adviser to the United States observer delegation to the Stockholm conference for the revision of the Berne Convention. I was present during the long weeks in June and July, 1967—there is a typo in my statement; it should be 1967, not '65—while the Stockholm Protocol relative to developing countries was debated, drafted and finally adopted. I sat with fellow members of the American delegation and witnessed what was a depressing erosion of the rights of authors, a drastic dilution of the international protection of intellectual property as it relates to developing countries. This victory by the developing countries proved to be a hollow one, for no significant country has yet acceded to the Stockholm Protocol.

DEVELOPMENTS RELATIVE TO UCC

As a member of the State Department's panel of advisers on international copyright in the period since the Stockholm conference, I have remained closely in touch with the developments relative to the UCC and the possible consequences of the Stockholm Protocol on its structure. During this critical trying period, it was heartening to note the manner in which the responsible officials of our State Department and of the Copyright Office, as well as members of the United States copyright community, played a leadership role in working toward a resolution of the tense international copyright dilemma and in formulating innovative concepts for its resolution.

Again in Paris in July 1971, I was honored to be an adviser to the U.S. delegation to the UCC revision conference, to be present and part of what resulted in a delicate balance between the legitimate interests of the creative artists of developed countries and their publishers, and the concerns of developing countries for their educational needs and aspirations.

PARALLEL REVISIONS OF BERNE CONVENTION AND UCC

As has already been described, the Paris Conference resulted in parallel revisions of the Berne Convention and the UCC which, in effect, killed the infamous Stockholm Protocol, strengthened the basic protection of the UCC, related the two conventions to each other in a workable manner, seems to have resolved the concerns of developing countries and, hopefully, restored mutual trust between developing and developed countries in this area. It is to be hoped that the threat that some leading developing countries would abandon the international copyright community will now be resolved and they will remain within its structure.

DANGER IF BERNE AND UCC DON'T COME INTO FORCE

The dangers to international copyright triggered by the Stockholm Protocol were very real. Should the Paris Acts of Berne and UCC not come into force, that danger would, I believe, be so much more acute that another resolution might prove infinitely more difficult, if not impossible.

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U.S. RESPONSIBILITY TO WORLD COPYRIGHT COMMUNITY

The United States has a very real responsibility to the world copyright community at this moment. We have undertaken a leadership in resolving the Stockholm dilemma and were among those who played a central role in developing the formula which proved acceptable to all interested parties, particularly those in conflict. By ratifying this treaty, we will take the final and conclusive step implicit in our course of action thus far.

CONCERN OF MUSIC PUBLISHERS

Mr. Karp, in his testimony, indicated or suggested that the music publishers have no interest. It is true that we do not have interest to the degree that other parties in the copyright field may have. Nevertheless, we are greatly concerned with the strength of international copyright. We are greatly concerned with the standards. We would be alarmed if the structure of the Berne Convention and of the UCC were seriously damaged.

I will now turn from my general observations as a participant, albeit a minor one, in the proceedings which resulted in the Paris decision, to some specific observations on the impact of the revision of the UCC on American music publishers.

MAINTENANCE OF BERNE CONVENTION'S LEVEL OF PROTECTION

The high level of protection of the Berne Convention among developed countries has been maintained and this is of great importance to American copyright proprietors. While the United States is not now a member of Berne, it is to be hoped that revision of our own domestic law will finally make that feasible. Meanwhile, we continue to enjoy the higher level of protection provided by that convention through what is referred to as the back door. The Paris Act of the Berne Convention will come into force only upon ratification of the Paris Act of the UCC by this country, France and Spain, as well as the United Kingdom, which has already done so.

INCLUSION OF SPECIFIC RIGHTS IN REVISED UCC

The inclusion in the revised UCC of the rights of reproduction, public performance and broadcasting for the first time, is a step toward its strengthening, I believe. No longer will it be necessary to rely exclusively on national treatment, which is the present basis of protection, for certain specific rights are now spelled out and, needless to say, public performance and broadcasting are of particular and special importance in music.

COMPULSORY LICENSING PROVISIONS

The compulsory licensing provisions made available to developing countries with respect to the reproduction and translation of copyrighted works have been the cause of prolonged discussion and concern. The music publishing business is on record as being opposed to compulsory licensing as it is now included in our own domestic law.

It is not inconsistent, however, that we view the compulsory licensing provisions in the UCC in a different light.

To demonstrate the difference between the provisions of our domestic law as it pertains to compulsory licensing for the reproduction of phonograms and the provisions of the revised Universal and Berne Copyright Conventions would take more time than is available here. Therefore, let me say in brief that although we oppose compulsory licensing practically and specifically in a particular and special situation, we do believe that its inclusion relative to developing countries will prove to be neither onerous nor unworkable if those developing countries which take advantage of the provisions do not do so cynically and if their actions in this field are governed by morality and integrity.

It is to be hoped that this is the manner in which these countries will conduct themselves since, if this is their future course of action, the convention includes procedures and safeguards which would make the transactions equitable.

Let me point out, Mr. Chairman, that the compulsory license is not a matter of immediate and inevitable invocation, if I may use the word. There is a period provided for the negotiation of licenses before a compulsory license may be invoked. That period varies with respect to the various materials involved. With respect to the reproduction rights and the compulsory license involved in that, the compulsory license only comes into being after attempts to reach a negotiated license have failed, and the treaty itself says, "Due provision shall be made at the national level to ensure that the license provides for just compensation that is consistent with standards of royalties normally operating in the case of licenses freely negotiated between persons in the two countries concerned."

And in the case of music, we do negotiate many licenses frequently, continually, with some countries which may choose to call themselves developing countries.

The market for western music is strong in many developing countries. The market for western music in some of the developing countries in the east, however, is at this moment not strong.

Let me emphasize now, Mr. Chairman, that I speak only for music publishers. It would be presumptuous of me to suggest the implications and consequences for other fields of copyright.

Within a compulsory licensing situation, the clearance of rights could prove to be troublesome and cumbersome. Music, however, has pioneered in the clearance of rights both domestically and internationally, and a well-structured working system has been brought into being. The established procedures which developing countries must follow before a compulsory license can be invoked, seem to us to present no insurmountable problems for processing and I have no doubt that if the traffic in compulsory licenses for the reproduction of copyrighted works develops to any substantial degree, an international structure will be brought into being to simplify the procedures and avoid confusion or practical difficulties.

As to the translation of lyrics of musical works, we are very pleased that the report accompanying the revised convention specifically states: "The Conference stipulated that the words, lyrics or text of musical compositions were not covered by the translation provisions of Article Vter," which relates to compulsory licenses of translations for developing countries. This decision of the conference is predicated

on the fact that the lyric is an integral part of a musical work and as regards the author's moral rights, it is not possible to make a literal translation of the words of a vocal work in view of the fact that the rhythmic pattern of the music must be respected.

TRIBUTE TO MEMBERS OF STATE DEPARTMENT AND COPYRIGHT OFFICE

Before closing, Mr. Chairman, I would like to pay particular tribute to those members of our State Department and to those members of our Copyright Office who devoted themselves with such energy and dedication to the resolution of the recent copyright dilemma and it was indeed a dilemma, Mr. Chairman. It was indeed possible that the entire structure of international copyright would collapse and this is a point to which I particularly address myself, even though, as Mr. Karp has suggested, we may not have the same vital interests in this particular or in some particular aspects of this treaty before you as other copyright groups.

PARIS ACT OF UCC SHOULD BE PROMPTLY RATIFIED

In summary, Mr. Chairman, it is the belief of the associations for which I speak here today that the Paris Act of the Universal Copyright Convention should be promptly ratified by the United States.

I thank you very much for the opportunity to present our views to you.

The CHAIRMAN. Thank you, Mr. Feist.

Senator Javits?

Senator JAVITS. Thank you, Mr. Chairman. Glad to see you, Mr. Feist. We will consider very seriously what you say.

Mr. FEIST. Thank you.

The CHAIRMAN. Thank you, Mr. Feist.

The next witness is Mrs. Bella L. Linden, Copyright Counsel, Crowell Collier and Macmillan, Inc., and Harcourt Brace Jovanovich, New York.

Senator JAVITS. Mrs. Linden has two of our most prominent publishers with her. May they be heard en bloc?

The CHAIRMAN. Yes, sir.

You may proceed.

STATEMENT OF BELLA L. LINDEN, COUNSEL, LINDEN AND DEUTSCH, ON BEHALF OF CROWELL COLLIER AND MACMILLAN, INC., AND HARCOURT BRACE JOVANOVICH, INC.; ACCOMPANIED BY WILLIAM JOVANOVICH, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, HARCOURT BRACE JOVANOVICH, INC.; AND RAYMOND HAGEL, CHAIRMAN OF THE BOARD, PRESIDENT AND CHIEF EXECUTIVE OFFICER, CROWELL COLLIER AND MACMILLAN, INC.

Mrs. LINDEN. Mr. Chairman, I would appreciate your aid and patience with me. I represent two of the major educational publishers and we are here with a statement that I would like to refer to more fully than the prior two witnesses were able to do. After all, it is our ox that is being gored. We would like the opportunity to have men of

your experience and understanding hear and see face to face the people whose problems we would like to present to you.

Therefore, although my statement is not really a long one and I will cut parts of it out, I would like your indulgence to read some of it in full, if I may.

The CHAIRMAN. Yes, you may proceed.

Mrs. LINDEN. Thank you, sir.

The CHAIRMAN. You didn't give the reporter the names of your associates.

Mrs. LINDEN. Yes. Mr. William Jovanovich and Mr. Raymond Hagel.

Senator JAVITS. Mr. Jovanovich is Board Chairman of Harcourt Brace Jovanovich and Mr. Raymond Hagel is Chairman of the Board of Crowell Collier and Macmillan, Inc.

Mr. Chairman, before you start, may I explain that I will have to leave, but I will stay as long as I can. I don't want to seem impolite.

Mrs. LINDEN. Mr. Chairman, Harcourt Brace Jovanovich and Crowell Collier and Macmillan are two of the five largest educational publishers in the United States. May I add a comment that has been provoked by the testimony of the last witness, Mr. Leonard Feist, of the Music Publishers Association.

Crowell Collier and Macmillan is the largest publisher of serious music in the United States, and during the testimony of Mr. Feist, Mr. Hagel handed me a note in which he says, "As the largest publisher of serious music, we have no real interest in the revisions. As a book publisher, our concern is vital."

REVISED UCC EFFECTS SAME RESULTS AS STOCKHOLM REVISION

I was present both at Stockholm and Paris. In July, 1971, the diplomatic conferences at Paris led, as you have heard so amply referred to, to parallel revisions of both the Universal and Berne Copyright Conventions. The draft documents for the Paris revisions were principally designed to make it cheaper for developing countries to use intellectual property created by authors and publishers in the developed countries, but these drafts were also originally intended to give authors and publishers of the developed countries adequate protection for the fruits of their labors and to avoid the broad concessions railroaded at Stockholm.

However, during the Paris conferences, the same block of countries which operated at Stockholm again railroaded concessions so that the Paris revisions of the Universal Copyright Convention now before this committee, albeit in different verbiage, effect the same results as the Stockholm revision which the United States delegation, the Copyright Office and representatives of those interested in protecting private property rights in literary property so successfully decried after Stockholm.

I recognize among those who have testified this morning some of my most vocal and staunch friends in the successful effort to defeat the Stockholm Protocol. All grow older; apparently some more tired than others.

RELAXATION OF ATTITUDE CONCERNING DAMAGE TO EDUCATIONAL PUBLISHERS AND AUTHORS

I have here a copy of a memorandum that Mr. Leo Albert, President of the international publishing branch of Prentice-Hall, wrote to Mr. Curtis Benjamin, with a copy to Mr. Robert Frase—Mr. Benjamin of McGraw-Hill and Mr. Frase who was adverted to earlier, of the American Publishers Association. The memorandum is dated March 29, 1972. The reason I am reading part of it into the record now is to point out that there is no sincere belief that the conventions in the Paris revisions are really less damaging to educational publishers and authors than was the Stockholm Protocol. There is simply a relaxation of attitude. Perhaps it is indelicate of me to include it in testimony, but their attitude seems to be if an act is inevitable, relax and accept it.

"Leo Albert to Curtis Benjamin of McGraw-Hill to Bob Frase, indicated copy to Bob Frase and Bella Linden. Re: Universal Copyright Convention revision report prepared by Bella Linden.

"Bella tells me she gave you a copy of her report in Washington. I have also received a copy. I think it is an excellent report in that it very accurately zeroes in on the problems."

Here the next paragraph is Mr. Albert's interpretation of my attitude: "Entre nous, Bella does not object to ratification in principle, realizing that developing countries do need special consideration where copyright is concerned. She does, however, object to ratification devoid of any further consideration being given to publishers and authors by the ratifiers—namely, the U.S. Government. And in that context I wholeheartedly endorse her recommendation. Many of us have said on many occasions that manufacturers of tractors are not asked to give their tractors away when our government deems it advisable to donate such equipment to developing countries. I think it is only fair for publishers and authors to be treated the same way."

May I add that neither Harcourt Brace nor Crowell Collier are members of the Association of American Publishers; so the association really does not speak for all or even all of the important educational publishers.

May I also point out that I see here among my good friends Mr. Herman Finkelstein, counsel for ASCAP, who is here today apparently to testify on behalf of ratification, supporting the resolution passed by the American Bar Association.

Mr. Karp's earlier statements are absolutely correct. The American Bar Association, usually so meticulous with respect to the legal nature and consequences of international treaties, slipped up, I regret to say, on this one. Theirs was the most cursory analysis and the substance of their entire report is really, if I read Mr. Finkelstein's and Mr. Charles Lieb's prepared statement correctly, set forth in that statement. It isn't much of a report, Mr. Chairman.

Furthermore, may I say that ASCAP, the American Society of Composers, Authors and Publishers, which Mr. Finkelstein represents in everyday life, passed a resolution endorsing the position

of CISAC, another performing rights society, that even though they are in favor of ratification, they still think that provision should be made for the authors and publishers. The authors and publishers of educational material should not be required to subsidize the concessions.

This is not in *haec verba* of the resolution, but I asked Mr. Finkelstein this morning if, in substance, I had it correct and he said yes, I did. I am putting it on the record simply because no one else is going to do so today, to my knowledge.

RESULT OF FAILING TO RATIFY 1971 REVISION

May I emphasize what Mr. Karp said earlier. The Universal Copyright Convention of 1955 will stay in existence. We will be members of it; we will be subject to membership requirements and have all the benefits of it even if we do not ratify the 1971 revision. All that happens if we fail to ratify the 1971 revision is that our authors and publishers of educational material, among others, will not be made subject to the preemption and expropriation of their property as sanctioned by the 1971 Paris revisions.

THREATS OF DEVELOPING COUNTRIES

I don't have to emphasize to men of the experience of the Senators here that there are always threats in negotiation: "We will quit. We will leave the convention. We will leave the negotiation. We will leave this or that unless we get our way."

Chicken Little cried the sky was falling. The sky didn't fall. There are those of us who wish to take the position that they are not experts on the sky and they don't know whether it is falling or not. All I can say is that in 1967, after Stockholm, the threats were made; in 1971 the threats were made again; in 1972 the threats are continuing.

It is in the interests, as I think that your own investigation will show, of the developing countries to maintain their convention relationships. I do not believe that there will be any mass exodus.

OBJECTIONS TO COMPULSORY LICENSING AND CONCESSIONS

May I itemize our basic objections, Mr. Chairman?

We object, first, to the establishment of a vehicle for the expropriation of the private property of American citizens without adequate compensation. Senate ratification of this treaty will constitute prior, formal United States approval of multinational expropriation in form and magnitude without precedent in our history.

Mr. Bruce Ladd of the State Department says the compulsory translation license of the existing convention has never been used; therefore the new compulsory licenses will not be used. The so-called "certain concessions" that the ABA refers to and the compulsory license that has been presented to you in a nebulous, round shape, are very, very specific and very different indeed from the existing provision and go to the jugular of educational publishing.

There is a big difference, gentlemen, between a compulsory license seven or ten years after the publication of a work and a compulsory license one or three years after publication. The bargaining positions,

I don't have to tell you, are vastly different. There is a big difference between these periods and when you talk in terms of scientific, technical and educational literary properties—we all know about the rate of obsolescence of information in property of that kind—we are talking about the current property of my clients and not a nebulous intellectual concept.

ELIMINATION OF OVER 80 COUNTRIES FROM MARKET

Secondly, ratification effectively eliminates in excess of 80 countries, gentlemen, from a normal and needed market of American authors and publishers.

The CHAIRMAN. I didn't understand that.

Mrs. LINDEN. There are at least 80—we counted them in our office taking into account various possible standards—countries which have and could claim developing-country status.

The CHAIRMAN. Yes.

Mrs. LINDEN. And I think our mathematics is not that faulty.

REVISIONS SELF-DEFEATING IN TERMS OF INTERNATIONAL COPYRIGHT CONCEPT

Thirdly, the Paris revisions are entirely self-defeating in terms of the concept of international copyright. It is nonsense to say that we are getting other benefits. Mr. Karp was amply clear, articulate and accurate in his analysis.

In discussions and correspondence which have taken place prior to today's hearing, and in the testimony by Mr. Bruce Ladd, it has been explained that the executive branch of the government views the Paris revision in terms of foreign economic assistance and a national policy commitment to help fulfill certain needs of the developing countries. We do not agree that the Paris revisions provide foreign economic assistance of any real significance. Here are the statistics:

The educational budget of the developing countries is spent for school construction, teacher salaries and classroom equipment. The cost of textbooks generally amounts to less than 5 percent. You know where we got the 5 percent? Five percent is a maximum even in a country like the United States and in developing countries it is that or considerably less.

Mr. Jovanovich tells me it is actually less than 2 percent. So we are taking a very optimistic figure of what developing countries spend on textbooks.

All right, let's say they spent 5 percent; the rest of their budget goes for school construction, teachers' salaries and classroom equipment. Authors' royalties normally might represent about 10 percent of this 5 percent; therefore, a fraction of 1 percent of the educational budget. But this fraction of 1 percent represents in dollars a substantial loss of income to individual authors. Thus, while the loss of potential royalties would be sorry deprivation to educational authors and severely disabling to American educational publishing, the financial contribution to education in developing countries is illusory.

The revised Universal Copyright Convention does not provide developing countries with printing presses, nor make any effort to encourage the development of indigenous industry and native creative

83-500—72——4

effort in the developing countries. The fact is that the provisions respecting foreign manufacture of works produced under the compulsory licenses which were railroaded in Paris will lead to the establishment of publishing consortiums of private wealth operating on a profit-making basis, serving a safe market protected from American competition. They will not even offer the possibility of employment to citizens of the developing countries because compulsory licensees can use translators and printing and publishing facilities outside the developing country.

If that is different from the freedom of export under the Stockholm Protocol, it is hardly a difference which my clients find comforting.

LIMITATION OF CONCESSIONS TO TEACHING, SCHOLARSHIP AND RESEARCH

Much has been made by the proponents of ratification of the fact that the concessions are limited "only to teaching, scholarship and research." They point out that compulsory translation licenses may only be granted for the purposes of "teaching, scholarship or research," while compulsory reproduction licenses are limited to use in connection with "systematic instructional activities."

The proponents of ratification therefore contend that expropriation of the rights of American authors and publishers is limited only to all of the textbooks, audio-visual materials, scientific, technical and reference works, film and microforms, and programed learning materials of Crowell Collier and Macmillan, Harcourt Brace Jovanovich and all other American publishers of similar products and all of the authors who create the works of education, research and scholarship. Their modest demand is that, in the national interest, these companies and authors must forego their entire market in more than 80 countries.

REASON STATE DEPARTMENT ACCEPTED PROVISIONS

The CHAIRMAN. What do you mean by "in the national interest"? What is the reason you think the State Department accepted these provisions which you find so offensive?

Mrs. LINDEN. I think—I was there, as I say, and I am not diplomatic by nature or by training and therefore if I am too blunt or too sharp, may I again say I would appreciate your indulgence and patience with me in that regard.

The CHAIRMAN. I am not offended by candor at all. Go ahead.

Mrs. LINDEN. I think the sense at both times was and is that the United States has to be on the defensive.

The CHAIRMAN. To what?

Mrs. LINDEN. Be on the defensive with developing countries. In our meetings with India and others, the attitude taken was, "You owe it to us; you have gotten rich off of us; you have to give us this."

Our position at all times, both in Stockholm and in Paris, was a very defensive one of the rich uncle at the poor nephew's wedding, where he feels he owes the world a living. That attitude is not a foreign policy attitude that I think has proven profitable in the past, and it is not one that I personally would encourage. Nonetheless, if experts of the State Department and the Foreign Relations Committee think it is an appropriate posture, it should not be at the cost and expense

of a particular segment of our society. Furthermore, since our State Department and our Government have not taken the attitude of acknowledging and acceding to preemption or expropriation tactics of foreign countries when it comes to industrial property or oil or IBM equipment or planes or other tangible objects, it is appalling to me that they should even consider that intellectual property of this country is second class and of less value than industrial property.

U.S. REGARD FOR INTELLECTUAL ACTIVITIES

The CHAIRMAN. You are not surprised. I mean, this is not unique at all.

Mrs. LINDEN. I am sorry——

The CHAIRMAN. It does not surprise you? Why do you express any surprise at that? Do you see in any other line any comparable regard for intellectual activities to those which you mentioned?

Mrs. LINDEN. I am sorry; I don't follow you.

The CHAIRMAN. It had never occurred to me that we held intellectual activity in very great respect in this country, certainly not in the public field.

Mrs. LINDEN. I am afraid that—I wish that I could say this off the record, but I guess on the record, too, I agree with you.

The CHAIRMAN. Then I only ask you why you are so surprised that they don't exhibit the same concern about the expropriation of a book that they do the expropriation of an oil well or a telephone company?

Mrs. LINDEN. Well, I guess I would not be surprised in certain segments of the society, but when the State Department officially takes that position and when the Copyright Office, the protectors, allegedly, of intellectual property, take that position, I am surprised and I guess more appalled than surprised; and I suppose your admonition is accurate; I shouldn't be surprised.

The CHAIRMAN. I don't know why I asked you that. The rest of your testimony seems so sophisticated that I wondered why you were so surprised at a development of this kind.

WITNESS' POSITION ON OLD AND NEW UCC

I still am not quite clear, since you were there and I was not, about why you think the State Department agreed to this provision. If I understand you correctly, you think we are much better off with the existing situation——

Mrs. LINDEN. Of course.

The CHAIRMAN (continuing). The existing UCC, than this new one. Is that correct?

Mrs. LINDEN. Of course, Mr. Chairman.

The CHAIRMAN. Is that correct?

Mrs. LINDEN. Of course; absolutely.

The CHAIRMAN. And you are very strongly against our approving this?

Mrs. LINDEN. Of course; it is a sign of weakness.

The CHAIRMAN. You are not like Mr. Karp, saying we don't like it, but we have no objection to your agreeing to it? Am I clear on that?

Mrs. LINDEN. I think you are absolutely clear on that.

The CHAIRMAN. Are you the only organization that you know of who takes this strong position against approval of this?

Mrs. LINDEN. Yes, because we are the only ones who are really seriously injured.

The CHAIRMAN. You are the principal producers of educational publications; is that correct?

Mrs. LINDEN. Among the principal ones, yes, sir.

The CHAIRMAN. Do you think those who are in your same situation share your views about it?

Mrs. LINDEN. I do think, as I read from Mr. Leo Albert's memorandum——

The CHAIRMAN. That is what I meant.

Mrs. LINDEN. Yes, but I do find that the official position of the American Publishers Association is, as I stated so indelicately, that they are going to take it so relax and enjoy it.

The CHAIRMAN. Yes.

Mrs. LINDEN. I think that is really basically it.

WITNESS' POSITION ON EFFORTS TO CHANGE DOMESTIC LAW

The CHAIRMAN. Do you favor or oppose the efforts to change domestic law in such a way as to enable us to join the Berne Convention?

Mrs. LINDEN. Mr. Chairman, of course I favor it, but may I say this: I sat here—yes, maybe I am still a little naive even though perhaps I don't appear so on the surface—I sat here and listened to the tenuous connection that was made between justification of these compulsory licensing concessions and our interests in Berne and, yes, again I was shocked and appalled. Our nonadherence to Berne and our promised domestic copyright revisions were not caused as a consequence in large measure of the motion picture activity. That was one factor, one, certainly not even a major factor in the kind of internecine warfare that even underlies the testimony that is being given today.

No one is willing or prepared—perhaps they are smarter than I—to permit to surface any illumination on the private concerns that motivate both testimony and concern with domestic legislation. Wherever anyone has an interest, real or imagined, or strategic or diplomatic reasons that have nothing to do with the basic issues, they take a stand, and in your experience, Senator Fulbright—I have followed your career—I know that you are much more fully aware than I how such stands are taken.

The CHAIRMAN. No, I wouldn't say that. I come from a very simple community that doesn't have many of these interests with which you are familiar.

DISADVANTAGES OF NOT APPROVING AGREEMENT

But let me ask you in another way. What are the disadvantages, if we do not approve this new agreement, to anybody in the publishing field or in the intellectual field?

Mrs. LINDEN. Well, I think a disadvantage of ratification is the weight that we will have given to the threats, to the blackmail that "We will quit". These developing nations at the moment, if they are not using much of our material, are contributing nothing to our authors

and publishers. If we do not ratify and they quit, the disadvantage, I believe, is greater to them than to us. Again, it is so difficult for me to recreate the atmosphere of both Stockholm and Paris. You know, at the same time the developing countries insisted, self-righteously and morally, that we owe them these concessions, they also insisted that they were entitled to full copyright protection, for example, their primitive African art—which I admit on the record I own a collection of. They demanded that they own the copyright, that I can't reproduce the primitive art that is archaic—one hundred, 150 years old—without giving some royalty to a developing country.

They also insisted that their folk music should be subject to copyright; so we are not even talking about their indigenous publishing possibilities and whether they are real or a dream. Every country believes it has writers and authors and will develop its own educational system and they have people in the country who sincerely are making efforts in that direction; and I say that at the same time that they were grabbing with full strength whatever copyright protection they could presently get or foresee for their own national interests, they self-righteously took the position that we owe it to them to make concessions. This attitude is not unfamiliar in the United States, too, and I am suggesting that it was an attitude and an atmosphere of pressure, of self-righteousness, of apology on the part of the developed and more affluent nations. Also, the fact is that when your ox isn't being gored it is very easy to be a nice guy and what happened was that since the developing countries were zeroing in only on the market of educational authors and publishers, everyone else could be a nice guy, go to luncheons and cocktail parties and shake hands and participate in sessions with the developing countries and give in—at our expense, not theirs. That is really what it amounts to.

EFFECT OF PAKISTANI OR INDIAN WITHDRAWAL

The CHAIRMAN. Supposing we don't sign this or don't approve it, and Pakistan, which has been mentioned, and others, say, "Well, all right, we withdraw from the UCC." Does that harm you or hurt you? What would be the effect upon people in your position?

Mrs. LINDEN. Well, I would say two things——

The CHAIRMAN. Are you any worse off than you are now?

Mrs. LINDEN. Educational publishers would be in the same position as they would be under the Paris revision of 1971.

The CHAIRMAN. You are no worse off?

Mrs. LINDEN. No. They would be worse off. You see,——

The CHAIRMAN. Why would they be worse off?

Mrs. LINDEN. Well, because—let's take India as a more apt example, because I did not participate in the Pakistani negotiations, but I did in the Indian situation.

India has a motion picture industry and a good one and they produce a lot of film and they certainly want protection for their motion picture industry; and all their threats about quitting, I think, are sheer nonsense. It is pressure and it is pressure which we submit to.

The CHAIRMAN. Supposing they do, though. Whom does this harm or what harm does it do?

Mrs. LINDEN. If they quit, insofar as educational publishers are concerned, they will have free use of the American authors' and publishers' educational materials.

The CHAIRMAN. They just take what they like?

Mrs. LINDEN. Yes, but that is what they are going to do under the 1971 revision anyway.

The CHAIRMAN. So you are saying that is the same as it would be?

Mrs. LINDEN. Yes, six is the same as a half dozen in my book.

The CHAIRMAN. That is what I mean. The compulsory licensing would have the same net result on your clients; is that right?

Mrs. LINDEN. That's right.

The CHAIRMAN. I wanted to be clear for the record.

Mrs. LINDEN. Yes, Mr. Chairman. What we are saying is that all the intellectual, as Mr. Karp said, window dressing, all the esoteric professorial construction and analysis of the tons of verbiage, lead to the same conclusion—it is six or a half dozen.

May I point out——

WHY STATE DEPARTMENT THINKS AGREEMENT ADVANTAGEOUS

The CHAIRMAN. That being the case, then I come back again to the fact that I am very puzzled why the State Department thinks this is such an advantageous agreement and wants us to approve it. What do we gain by it?

Mrs. LINDEN. I think——

The CHAIRMAN. How do you read it? You were there. You heard all of it. What in the world is the reason, if you are right?

Mrs. LINDEN. Well, you probably have more experience as a Senator than I have as a lawyer in cross-examining witnesses.

The CHAIRMAN. No; I don't.

Mrs. LINDEN. Let me say this: When a witness first takes a position on anything, you ask him a question and then you lead them with further questions. Most witnesses are intractable even though they know they were wrong in their first blurting out of their statement. I think that is true of an awful lot of people. I think the State Department representatives were advocates participating in the treaty negotiations and wanted to see it concluded. I think the State Department may, in all fairness, have interests outside of copyright, outside of this treaty entirely, in dealing with these nations.

The CHAIRMAN. What interests? Go ahead. That is what I want to know.

Mrs. LINDEN. I wouldn't know. The State Department deals with developing countries on a plethora of issues that are totally unrelated to intellectual property.

The CHAIRMAN. Yes, that's right.

Mrs. LINDEN. In their relationship with these various governments and governmental representatives, they undoubtedly take tough, intractable stances. That is my imagination working.

The CHAIRMAN. I didn't get that. What?

Mrs. LINDEN. I think in some issues our State Department has to take pretty tough stands with developing countries.

The CHAIRMAN. You mean to get them to vote with us in the U.N.?

Mrs. LINDEN. Beg pardon?

The CHAIRMAN. You mean to persuade them to vote with us in the U.N.?

Mrs. LINDEN. Yes.

The CHAIRMAN. That type of thing?

Mrs. LINDEN. Yes, and the Paris concessions seem to be a very little cost and nobody is making a noise. Mr. Jovanovich wishes to make a comment.

The CHAIRMAN. Yes.

QUESTION OF STATE DEPARTMENT'S ATTITUDE

Mr. JOVANOVICH. Yes, I was not in Paris, but I would note that we are having problems in the U.S. in revising the 1909 copyright law. You heard about that earlier today, Senator.

The CHAIRMAN. Yes.

Mr. JOVANOVICH. This has actually been going on 8 years, not a couple of years but 8 years, and it may go on another 25 years before we get a revision of the 1909 copyright act.

One thing emerges in domestic discussions about copyright which may be applicable here: education—nobody is against education; it is like home, mother and God; it is perfectly safe to say you are in favor of education and in fact you ought to be in favor of education. So when the developing countries come forth and say, "We simply want to have the benefits of the scientific, educational, instructional material which you as developed countries prepared," it is very hard, I think, for anybody in the State Department to say, "Well, we are going to be tough about this. That is property. That is property that belongs to people; we have no right to give it away by treaty," and they say, "Well, it is very difficult to take a position against the dissemination of information."

After all, there are certain educational groups in the U.S. who think that our domestic copyright law should permit schools, which are nonprofit organizations, to use educational materials rather freely without payment.

So, if we have people in this country who feel this way, it is not to be wondered really that the State Department would be loath to take the position that it was standing in the way of the intellectual development of other countries. The fact that this is private property is another question, but it reminds me of what Jesse Unruh once said. Somebody said, "Why are campus politics so nasty?" and he said, "Because the stakes are so low."

Well, the stakes here aren't very big. The State Department isn't giving away billions of dollars; it is giving away a few millions of dollars. It happens to be our millions of dollars. I would guess that if the State Department were in Paris and the subject was giving away major industrial installations, it would be a little more careful. For one thing, everybody can be nasty about industry, you know; that is a popular sport. I think you just indulged in it yourself a bit. It is easy to be against IBM because they are so big. We publishers play this role ourselves.

But when you talk about intellectual property it is very difficult to stand up and say, "Look, this is property," and it may be more respectable, it may be more palatable than, let's say, steamshovels, to talk about, but it still is property.

So my answer to the question of the State Department's attitude is: the stakes were low; they could be heroes; everybody wants to be a hero. I think if I were in their position I probably would have said it is easier to be compliant on this issue. We may have to fight a tougher one somewhere else.

COMPARATIVE LOSS FROM CONVENTION AND DEVELOPING COUNTRIES' WITHDRAWAL

The CHAIRMAN. Do you see that you are going to lose much more this way than if the developing countries withdraw from the convention?

Mr. JOVANOVICH. No. I don't think the developing countries will withdraw. They have more to lose from withdrawing from the copyright conventions.

The CHAIRMAN. They have?

Mr. JOVANOVICH. They certainly do.

The CHAIRMAN. Has Pakistan much to lose?

Mr. JOVANOVICH. Pakistan hasn't got much of anything to lose, but India is another matter.

The CHAIRMAN. You think they would have?

Mr. JOVANOVICH. I think that on the products of their film industry, on their audio-visual materials, they want copyrights.

EXAMPLE OF CUBA

The CHAIRMAN. While I have you there is one other example. Take Cuba. Is she a member of the existing UCC or the Berne Convention?

Mr. JOVANOVICH. I don't really know.

Mrs. LINDEN. Yes, I believe she is.

Mr. JOVANOVICH. We are not selling them books in Cuba.

The CHAIRMAN. If we agree to this convention, would the Cubans be entitled to a compulsory license under this convention?

Mrs. LINDEN. Yes.

The CHAIRMAN. She would be?

Mrs. LINDEN. Yes.

The CHAIRMAN. I wondered. Often some of my colleagues like to use Cuba as a whipping boy for all kinds of things and I wondered whether or not you had thought about that.

Mr. JOVANOVICH. Well, the problem of the Soviet Union is not really related to this question; I mean, to get into that is to get into a vast subject which is not, I think, the subject of this discussion.

ISSUE OF WHETHER OR NOT MATERIALS ARE PROPERTY

The real issue is whether or not you hold educational, scientific, instructional materials to be property, and if you hold it to be property, whether to maintain it and treat it as such. I think Mr. Hagel of Crowell Collier maintains that transactions in such materials ought to be conducted and contracted in a normal way. This revision does not provide for that.

I can imagine that a group of Frenchmen—why Frenchmen? because of Frenchmen—getting together, setting up a printing press, and beginning, forming a consortium and beginning to prepare mate-

rials for five or six African countries that use the French language, which they can do very easily. This revision doesn't even say that the materials have to be produced in that developing country. They can be produced in Switzerland.

I don't know why the U.N. doesn't have a criterion for declining countries, you know. Maybe the U.K. could ask for some special consideration as a declining country. I mean, if you are going up you might as well go down. There are going to be declining countries who will say to themselves, "Let's take advantage of this. Let's set up a consortium and prepare books for these people," which they can do under this revision.

The CHAIRMAN. How would you rate the U.S. on that? Is it declining or going up?

Mr. JOVANOVICH. No, the United States is in great shape.

The CHAIRMAN. It is?

Mr. JOVANOVICH. Yes, sir. We are just beginning.

The CHAIRMAN. Anything else?

Mrs. LINDEN. If I may, I would like to get on record——

DEVELOPED AND DEVELOPING COUNTRIES

The CHAIRMAN. The staff says, in checking the lists of the U.N. members, of 132 they can find only about 17 or 18 that they would consider developed. All the rest would be developing.

Mrs. LINDEN. I wouldn't quarrel with him particularly since it is left to them to look in the mirror and make their own decisions and there is really no machinery for proper, appropriate challenging. I would like to see someone wait for a case to come up in Senegal where we are critical of their own estimate of what is fair and just compensation to American publishers and authors. Can you imagine any situation in which a developing country feels that it is not fair to take from American authors and publishers with the most infinitesimal payment? Under the Paris revisions what is fair is left to the judgment and the rationalization of developing countries, who find it easy to rationalize themselves into expropriating our oil wells, industry, et cetera. As you so aptly pointed out, knowledge is more ephemeral and, as Mr. Jovanovich stated, they can rationalize they are doing it for the sake of education and therefore it is an appropriate activity.

AUTHORS OF EDUCATIONAL, SCIENTIFIC AND RESEARCH WORKS

I would like to point out, Mr. Chairman, that the authors of educational, scientific and research works are not the highly publicized personalities who write best sellers and appear on late evening television talk shows. Most are practicing teachers. Few educational authors become rich as a result of their writings. The NEA (National Education Association) at times has attempted to speak for educational authors but, may I say, the NEA talks for teachers who are users of these materials and a small ad hoc committee of the NEA has in the past, on domestic issues, insisted their view is shared by all of the educational authors in the U.S. I submit unequivocally that that is inaccurate and I am phrasing it as charitably as I can. Actually, the authors of these materials do not have an organization to speak for their interests. The cooperative relationship between publishers

and authors of textbooks, scientific and technical works is such that traditionally these authors look to their publishers to protect their interests. Accordingly, although not designated by anyone as their official spokesman, it falls upon us to call their interests and needs to the attention of this committee.

To the extent it is possible to describe a typical textbook author, he or she is a member of the faculty of a highly regarded, though probably not Ivy League, college or university, enjoys an excellent reputation in his or her own field but is little known outside of it, has an income well under $20,000 a year and counts on royalties to pay for braces for the children's teeth, a second car for the family, a vacation or study year abroad or some similar expense.

More often than not, royalties on textbooks, reference works or professional books are split between several authors. Sole authorship of an educational or reference work usually entails many thousands of hours over a period of several years doing library and other research, field-testing and consulting.

Authors' royalties on school textbooks average about 6.3 percent of the total selling price; on college and professional works, authors' royalties represent an average of 15.8 percent of sales—in either case a small fraction of 1 percent of any nation's total educational expenditures.

EDUCATIONAL, SCIENTIFIC AND RESEARCH PUBLISHERS

I will not take your time to describe the functions of educational, scientific and research publishers. It is set forth in my prepared statement. It is clear that all the platitudes and lovely pro-ratification comments that were expressed this morning did not zero in on the activities of the authors and publishers of educational materials, including audio-visual materials, film strips et cetera.

WHY PUBLISHERS ARE MORE DETERMINED THAN AUTHORS LEAGUE

The CHAIRMAN. Why do you think you are so much more determined as publishers than the representatives of the authors themselves, the Authors League of America? Mr. Karp did not like it, but he said he didn't oppose it. I would think the authors would be just as determined about this as the publishers.

Mrs. LINDEN. Mr. Chairman, that is the point I am making. The members of the Authors League of America are the authors of novels, poetry and plays.

The CHAIRMAN. Not textbooks?

Mrs. LINDEN. Precisely. And Mrs. Karp has stated that the Paris revisions offer a "dismal" prospect even for the members of the Authors League.

Mr. Hagel would like to make a statement. Is that all right with you, Mr. Chairman?

The CHAIRMAN. Sure.

SURVEY OF TEXTBOOK AUTHORS

Mr. HAGEL. Mr. Chairman, we sent our own authors a summary of the proposed revisions, particularly our authors of college, elementary

and high school textbooks. I am not aware of any other survey that has been made by anyone to determine the position of the American citizens whose earnings are being talked about. We have received thus far only a small response and I mention this with some shame because as far as I know it is the only sample. We have 14 letters back; 13 of the 14 responding authors of textbooks oppose these revisions that are under discussion today.

Thank you.

LACK OF TEXTBOOK AUTHORS IN AUTHORS LEAGUE OF AMERICA

The CHAIRMAN. If I understand it, the Authors League of America does not include many authors of textbooks. Why is that? Do they have any separate organization or don't they organize?

Mrs. LINDEN. Well, because textbook authors——

The CHAIRMAN. Are primarily teachers?

Mrs. LINDEN. Yes, or they are on staffs of universities.

The CHAIRMAN. Yes.

Mrs. LINDEN. There are very few that earn enough from the writing itself to make that a full-time career.

The CHAIRMAN. Yes.

Mrs. LINDEN. Also, they are spread all over the country, much more so than, say, the dramatists where Broadway and the West Coast are the focal points of their interest.

The CHAIRMAN. Okay.

Do you have anything else to say?

WITNESSES NOT MEMBERS OF AMERICAN ASSOCIATION OF PUBLISHERS

Mr. JOVANOVICH. Senator Fulbright, I think it would be unfair to leave this table without pointing out that Crowell Collier and Macmillan and Harcourt Brace Jovanovich are among the five largest educational publishers in the U.S. We are not members of the American Association of Publishers.

The American Association of Publishers does, I think, favor ratification of this and, therefore, we are not speaking for others. We are speaking for ourselves.

The CHAIRMAN. Are those people who specialize in fiction?

Mr. JOVANOVICH. No. There are others in the association who are engaged in business similar to the kind of publishing that Crowell Collier and Macmillan and Harcourt Brace Jovanovich engage in. We are simply not members of the association. We take a different view. I don't know that all members of that association favor ratification. I have no way of knowing. But we are speaking for ourselves and we think we are speaking for educational authors; we think we are also speaking for some other educational publishers, but we have no other way of knowing.

Mr. Hagel and I simply want to point out that our two very large companies are not members of the American Association of Publishers and we are speaking, therefore, not for an association, not for hundreds of publishers, but for ourselves. We may also be speaking for scores of others; we don't know.

PERCENTAGE OF EDUCATIONAL PUBLISHING WITNESSES' FIRMS REPRESENT

The CHAIRMAN. Could you say, since you have raised that, what percentage, roughly, of the educational publishing business your two firms represent? You don't have to be precise about it. Are you half of it?

Mr. JOVANOVICH. Oh, no; I would say around 15 percent.

The CHAIRMAN. Fifteen percent. Is it fair to say the other 85 percent did approve?

Mrs. LINDEN. No.

Mr. JOVANOVICH. We don't know. All I say is we don't represent the association.

SENTIMENTS OF PRENTICE-HALL

Mrs. LINDEN. Mr. Chairman, I refer to my earlier comment concerning the memorandum of Mr. Leo Albert of Prentice-Hall. Prentice-Hall is a member of the association. Prentice-Hall is apparently one of the group that says, "Look, they are going to take it from us; let's give it willingly." Nonetheless, the true sentiments are expressed in the memorandum of March 29, 1972. I know of no analysis of the Universal and Berne copyright conventions that was sent to all of the association members similar to the analysis and charts which I prepared and which are attached as exhibit A to my statement. I do know that Mr. Albert, in the last paragraph of his memorandum to Mr. Curtis Benjamin stated the following: "Bella has offered to meet with us to discuss her paper further whenever we are available. She has also extended to me a reservation,"—humorous—"(New Jersey being a developing state) by allowing us to reproduce as many copies of her report as necessary without payment of advance and for a nominal fixed fee of one bushel of Jersey tomatoes in season."

I don't believe that my report was passed to all of the members of the association. I don't believe that the charts attached to my report which analyze Berne, the UCC, the Stockholm Protocol and the Paris revisions, were passed around, I don't believe a similar analysis was done. I don't believe the educational position was pointed out in this fashion.

STATE DEPARTMENT POSITION ON COMPENSATION QUESTIONED

I do know that the Copyright Office prepared similar charts. I do know they were annexed to the State Department's response to you in reply to your inquiry when you first received Mr. Hagel's letter and my report. I know that the Copyright Office charts are structured differently—you know, two people, their writing style is different and the structure is different—but the fact is that nowhere did the State Department say that the Linden chart was in the slightest way inaccurate. Nowhere in its response to you did the State Department say that the Paris revisions do not constitute prior expropriation. The State Department's position was that "they are going to quit; they are threatening us and therefore this is the best we could have done under the circumstances and therefore this is what we did."

Nowhere did Mr. Bruce Ladd say in his statement that the concept of assuring compensation to American authors and publishers similar

to the philosophy of the Trade Expansion Act of 1962 is wrong. Nowhere did he say that compensation is unnecessary or unwarranted or that it shouldn't be considered. But I do know that Mr. Bruce Ladd said to me this morning, in the presence of these gentlemen, that the only trouble with pressing for compensation is that it would delay ratification of the Paris revision. He asked me: "Why can't we treat these two things separately?" He said: "Why don't we ratify the treaty and then if you are really hurt, you come back to Congress and you ask for relief."

And my response was I don't know of any situation where once something is given away you can get it back; and I said, "Furthermore, Bruce, we are all too familiar with the salami style of bargaining where after each year all you can prove is only that another slice of salami was taken away from you. And the fact is that is all we have got; all we have is educational publishing."

The CHAIRMAN. Thank you very much, Mrs. Linden. It has been a very interesting exposure of the question, I think. We will certainly consider it most seriously.

Thank you very much.

(Mrs. Linden's prepared statement follows:)

STATEMENT OF BELLA L. LINDEN ON RATIFICATION OF THE PARIS REVISION OF THE UNIVERSAL COPYRIGHT CONVENTION SUBMITTED ON BEHALF OF CROWELL COLLIER AND MACMILLAN, INC. AND HARCOURT BRACE JOVANOVICH, INC.

Mr. Chairman, and members of the Committee, my name is Bella L. Linden. I am a partner in the law firm of Linden and Deutsch, and am appearing on behalf of Crowell Collier and Macmillan, Inc. and Harcourt Brace Jovanovich, Inc. Crowell Collier and Macmillan and Harcourt Brace Jovanovich are among the five largest educational publishers in the United States.

Mr. William Jovanovich, Chairman and Chief Executive Officer of Harcourt Brace Jovanovich, Inc. and Mr. Raymond Hagel, Chairman of the Board, President and Chief Executive Officer of Crowell Collier and Macmillan consider this Committee hearing to be of such fundamental importance to the interests of educational, professional and scientific authorship and publishing that they both are here today. May I present Mr. Hagel and Mr. Jovanovich; both are available to answer questions.

I was among the panel of advisors to the United States delegations to the Stockholm Conference for revision of the Berne Copyright Convention in 1967 and to the Paris Conferences for revision of the Berne and Universal Copyright Conventions in 1971. I was counsel for many years to the American Textbook Publishers Institute, which has recently merged with the American Book Publishers Council. I was a member of the Panel of Experts appointed by the Register of Copyrights to consider revison of our domestic copyright law, and am now a member of the Committee on Scientific and Technical Information (COSATI) of the Federal Council for Science and Technology and Chairman of the COSATI sub-panel on rights of access to computerized information systems.

I was present at the Stockholm Conference five years ago when the Stockholm Protocol for Developing Countries was railroaded to adoption as part of a revision of the Berne Copyright Convention. The Stockholm Protocol granted, in substance, the same broad concessions to the eighty so-called developing countries for use of others' literary properties as are before this Committee for consideration. The United States delegation was then among the leaders in its vocal and active objection to the Protocol. The Stockholm Protocol was so effectively criticized in the developed countries that it never came into effect.

In July, 1971 diplomatic conferences at Paris led to parallel revisions of both the Universal and Berne Copyright Conventions. The draft documents for the Paris revisions were principally designed to make it cheaper for developing countries to use intellectual property created by authors and publishers in the developed countries, but these drafts were also intended to give authors and publishers of the developed countries adequate protection for the fruits of their

labors. During the Paris conferences, however, the same bloc of countries which operated at Stockholm again railroaded concessions so that the Paris revision of the Universal Copyright Convention now before this Committee, albeit in different verbiage, effects the same results as the Stockholm revision which the United States Delegation, the Copyright Office, and representatives of those interested in protecting private property rights in literary property so successfully decried after Stockholm.

I recognize among those who have testified this morning some of my most vocal and staunch friends in the successful effort to defeat the Stockholm Protocol. All grow older; apparently, some more tired than others. To paraphrase an indelicate cliche, I seem to perceive the prevailing attitude today as—if an Act is inevitable, relax and accept it. Apparently this holds especially true with respect to the Paris revisions of the Universal Copyright Convention.

What all objected to at Stockholm, and what we object to today, is the following. The Universal Copyright Convention as revised at Paris:

1. Establishes a vehicle for the expropriation of the private property of American citizens without adequate compensation. Senate ratification of this treaty will constitute prior, formal United States approval of multi-national expropriation in form and magnitude without precedent in our history;

2. Effectively eliminates in excess of eighty countries from a normal and needed market of American authors and publishers; and

3. Is entirely self-defeating in terms of the concept of international copyright.

In discussions and correspondence which have taken place prior to today's hearing, it has been explained that the Executive Branch of the Government views the Paris revision in terms of foreign economic assistance and a national policy commitment to help fulfill certain needs of the developing countries. We do not agree. The educational budget of a developing country is spent for school construction, teachers' salaries, and classroom equipment. The cost of textbooks generally amounts to less than five percent (5%). Authors' royalties normally might represent about ten percent (10%) of this five percent, a fraction of one percent (1%) of the educational budget, but representing a substantial loss of income to individual authors—hardly among our most affluent citizens. Thus, while the loss of potential royalties would be sore deprivation to educational authors and severely disabling to American educational publishing, the financial contribution to education in developing countries is illusory.

The revised Universal Copyright Convention does not provide developing countries with printing presses, nor make any effort to encourage the development of indigenous industry and native creative effort in the developing countries. The fact is that the provisions respecting foreign manufacture of works produced under the compulsory licenses granted the developing countries under the Paris revisions will lead to the establishment of publishing consortiums of private wealth operating on a profit making basis, serving a safe market protected from American competition, and not even offering the possibility of employment to citizens of the developing countries.

Much has been made by the proponents of ratification of the fact that the concessions are limited "only to teaching scholarship and research." They point out that compulsory translation licenses may only be granted for the purposes of "teaching, scholarship or research", while compulsory reproduction licenses are limited to use in connection with "systematic instructional activities."

The proponents of ratification therefore contend that expropriation of the rights of American authors and publishers is limited only to all of the textbooks, audio-visual materials, scientific, technical and reference works, film and microforms, and programmed learning materials of Crowell Collier and Macmillan, Harcourt Brace Jovanovich and all other American publishers of similar products and all of the authors who create the works of education, research and scholarship. Their "modest" demand is that, in the national interest, these companies and authors must forego their entire market in more than 80 countries.

THE AUTHORS OF EDUCATIONAL, SCIENTIFIC, AND RESEARCH WORKS

The authors of educational, scientific and research works are not the highly publicized personalities who write best sellers and appear on late evening television talk shows. Most are practicing teachers. Few become rich as a result of their writings. They do not have an organization to speak for their interests. The cooperative relationship between publishers and authors of textbooks, scientific and technical works is such that traditionally these authors look to their publishers to protect their interests. Accordingly, although not designated by anyone as

their official spokesman, it falls upon us to call their interests and needs to the attention of this Committee.

To the extent it is possible to describe a "typical textbook author," he or she is a member of the faculty of a highly regarded, though probably not Ivy League, college or university, enjoys an excellent reputation in his or her own field but is little known outside of it, has an income well under $20,000 a year and counts on royalties to pay for braces for the children's teeth, a second car for the family, a vacation or study year abroad or some similar expense. More often than not, royalties on textbooks, reference works, or professional books are split between authors. Sole authorship of an educational or reference work usually entails many thousands of hours over a period of several years doing library and other research, field-testing and consulting.

Authors' royalties on school textbooks average about 6.3 percent of the total selling price; on college and professional works authors' royalties represent an average of 15.8 percent of sales—in either case a small fraction of one percent of any nation's total educational expenditures.

THE PUBLISHERS OF EDUCATIONAL SCIENTIFIC AND RESEARCH WORKS

The role of American educational publishers combines many of the functions of literary expression, artistic design and technical skills in applied research, packaging, consulting and training as well as manufacture, marketing and distribution. Except in the case of scientific and technical works, it is rare for an author to submit a finished work to his publisher. By and large it is the publisher who discerns educational needs, searches out and selects the author (or, more commonly, groups of authors) to create the books and materials to satisfy the requirements of schools and universities, and directs and supervises the planning, design and creation of the works. In the case of innovative materials, the publisher also provides consultants and conducts workshops to train teachers in the use of the new teaching tools.

The traditional stock-in-trade of the educational publisher has been the textbook and the somewhat later developed "Teachers Edition". Beyond these traditional learning media, technological progress has created the market and technique for a variety of innovative materials of the new educational media. Thus, filmstrips and slides, motion pictures, transparencies, sound recordings, video cassettes and tapes, microform reprints, computer-assisted learning materials and similar elements of "multi-media", "audio-visual" and "programmed" instruction are finding wide use in the school room. Closed system broadcasting has created another vehicle for bringing these materials, as well as the more traditional products of educational publishing, into use. Let no one confuse the notion of "developing" countries with an inability or disinclination of such countries to utilize these innovative materials or the vehicle of broadcasting. It was not academic considerations which led the Paris draftsmen to make specific provisions for concessions with respect to "audio-visual fixations", and the Report of the General Rapporteur of the Paris Conference (UCC) notes that "it was urged that broadcasting is coming to play a more and more important part in the educational programmes of developing countries . . ." (Report, par. 82).

Very large investments are needed to produce a major instructional program. It is not at all uncommon, for example, for a publisher to invest more than one million dollars in prepublication development costs alone for the creation of an elementary reading program which will take five or ten years to reach the market and another three to five years to gain acceptance and even to begin to pay off the investment. It has been estimated that the preliminary investment in plates for a single high school history textbook, workbook, teachers manual and test combination may exceed one hundred thousand dollars. With the wide acceptance of the types of innovative educational materials noted above, the investment of time, effort and money of educational publishers in their products increases multifold.

In many respects publishing exists apart from other businesses. Educational publishers are in a very real and essential sense engaged in public service; they are also engaged in the operation of commercial businesses. To progress, the educational publisher must anticipate and effectively serve a broad range of instructional and scholarly needs. To survive, the educational publisher must make a profit.

Academic Press, a subsidiary of Harcourt Brace Jovanovich, is the largest scientific and technical publisher in the United States and enjoys a large foreign market for its works. The pressures for scientific and technical progress in the so-called developing countries are so widely known that for the purpose of this

hearing it seems only necessary to state that the Paris revisions will adversely affect the interests not only of the authors and publishers of scientific and technical works, but also of American manufacturers of products which find their relevance in technology. Obviously, the preemption of more than eighty countries as a market for these publications is a serious erosion of the rights and incentives that we have traditionally accorded to American citizens.

THE DEVELOPING COUNTRIES AS A MARKET FOR AMERICAN EDUCATIONAL, SCIENTIFIC AND RESEARCH PUBLISHING

Assisting in the educational progress of developing nations is a matter of urgent commercial as well as social interest to American educational publishers. As our own school age population ceases to grow, they must look overseas for future market growth. Some 63 percent of the world's school age children live in the developing countries. The export market for textbooks, which used to be almost entirely British, increasingly is becoming an American market, particularly in scientific and technical fields. The Macmillan Company, a subsidiary of Crowell Collier and Macmillan, tells me that the developing countries account for between 37 and 38 percent of its total export.

The developing countries as a market for the products of American publishing are not limited to original editions of new works. It is generally conceded that the largest number of translations throughout the world are made of American and British publications; similarly, the widespread adoption of the English language has created a great foreign demand for facsimile reprints of prior American works.

A short time ago our office prepared an analysis of the Paris revisions and a set of charts comparing the provisions of the Stockholm Protocol and the Paris Convention with respect to the issues that reach the jugular of educational, scientific and technical publishing. We analyzed the concessions to be accorded to the developing countries and we concluded that in each instance where Stockholm gave away six, Paris gives away a half dozen. A distinction in form without difference in substance. Annexed as Exhibit A is the statement of our analysis and the supporting charts.

This statement was circulated on behalf of Crowell Collier and Macmillan and Harcourt Brace Jovanovich among various interested groups and individuals, including members of this Committee, other members of the House and Senate, and the State Department. Many have responded with deep concern for the damage the Paris revisions will inflict on American authors and publishers and have expressed support for our position that ratification can only be justified if steps are taken to insure compensation for such injuries.

In a letter to the Chairman of this Committee, the State Department responded to our earlier statement and analysis. The Department's response included charts prepared by the Copyright Office which compared the provisions of the Stockholm Protocol and the Paris revisions.

We must emphasize in all fairness that nowhere in their response did the Department claim that the Copyright Office charts in any way contradict the charts prepared by our office. Nor did the State Department in any manner respond to our position that monetary compensation must be a *sine qua non* of ratification. We appreciate that in their official capacity the State Department did not find it appropriate to express their views on compensation. Perhaps, in the subtleties of diplomatic correspondence, their failure to comment on our request for compensation may be construed as a silent expression of sympathy.

With respect to ratification, the State Department appears to feel that formal accession to the demands of the developing countries for free access to American works is the only alternative to those countries unilaterally obtaining such access.

Threats by foreign countries to expropriate American property are not unprecedented. However, I do not recall any instance in our history where the Senate has consented in advance to such expropriation because of fear that such threats would be acted upon.

Exhibit B is the letter of the Department of State to Chairman Fulbright. Exhibit C is our response to the Department's comments.

The accuracy of our analysis of the Paris revisions is supported in an article entitled "Downgrading the Protection of International Copyright," by Irwin Karp, counsel to the Authors League. In this article, annexed as Exhibit D, Mr.

Karp carefully examines the operation of the Paris concessions in the light of the real facts of publishing life. He concludes that the compulsory licensing system established by the revised Convention is a "dismal prospect" for authors in both the developed and developing countries and that "a careful analysis of the effects and consequences of the two new conventions is imperative, before the Senate decides what action the United States should take." I would note that the authors group represented by Mr. Karp whose interests he sees as "dismally" affected generally does not include the authors of educational materials, whose futures are that much dimmer.

Exhibits A, C and D fully explain our position with respect to ratification and compensation and contain supporting analysis and precedent. At this point, I will only summarize our conclusions.

THE REVISED UCC ESTABLISHES A VEHICLE FOR THE EXPROPRIATION OF THE PRIVATE PROPERTY OF AMERICAN CITIZENS WITHOUT ADEQUATE COMPENSATION

The revised Universal Copyright Convention withdraws property, representing substantial investments of time, effort and money, from the control of its owner, substituting a national agency of a developing country and allowing it to deal with such property as it sees fit in the name of teaching, scholarship and research. What clearer example can there be of expropriation, defined in the dictionary as "to dispossess (a person) of ownership".

There is nothing in this country's history or experience with foreign nationalization of American businesses which would give us any reason to expect that the developing countries will have a reasonable concept of "adequacy" of compensation in dealing with the literary property of American authors and publishers.

THE REVISED UCC EFFECTIVELY ELIMINATES IN EXCESS OF EIGHTY COUNTRIES FROM A NORMAL AND NEEDED MARKET OF AMERICAN AUTHORS AND PUBLISHERS

We have previously described the interests of American authors and publishers of educational, research and scientific materials in the developing countries as a market. The provisions of the revised convention will effectively bar these countries from reach; indeed, certain provisions of the revision will give impetus to the establishment of foreign publishing enterprises, operating on a profit making basis and servicing a safe market of developing countries. There can be no legitimate reason for depriving American publishers of the opportunity to serve these markets, either through export or cooperation in the development of indigenous publishing.

American publishers are not insensitive to certain specific needs of the developing countries; it is an established practice of several American publishers to manufacture special editions of their works in foreign countries in order to make inexpensive copies available to foreign students. However, to make such special provisions a matter of national economic assistance policy rather than individual initiative requires that our government either assume the function of providing the assistance or assume the responsibility of assuring compensation to our authors and publishers for their enforced contributions.

Compared with other businesses of similar size, publishers own very little in the way of physical plant or manufacturing facilities. Their assets consist of the copyrights they control. Their ability to invest in the future—that is in the development of tomorrow's educational tools—depends upon the present and prospective income produced by their backlists of copyrighted works produced in past years to meet current educational needs.

Since 1962, Crowell Collier and Macmillan has invested over $1,750,000 in the development and continual updating and expansion of the Collier-Macmillan English program. This program, created primarily for use in teaching English as a foreign language in the developing countries, is the most extensive of its kind ever produced by an American company and paid for out of its own resources. It is used virtually throughout the world. Considering the attitudes expressed toward educational publishing and embodied in the operation of the revised Universal Copyright Convention, American publishers would, at the very least, have very serious doubts as to the advisability of such an investment today.

IF THE REVISED UCC IS RATIFIED BY THE SENATE, CONGRESS MUST PASS LEGISLATION ASSURING DOMESTIC AUTHORS AND PUBLISHERS OF COMPENSATION FOR THEIR ECONOMIC INJURIES

In 1962, Congress passed a Trade Expansion Act designed to make possible the Kennedy Round of tariff reductions. The Act incorporates a number of adjustment assistance provisions designed to assist those workers and industries injured by lowered tariffs. In sending the preliminary form of this Act to the House, President Kennedy stated:

> When considerations of national policy make it desirable to avoid higher tariffs, those injured by that competition should not be required to bear the full brunt of the impact. Rather, the burden of economic adjustment should be borne in part by the Federal Government.
>
> * * * * * * *
>
> Just as the Federal Government has assisted in personal readjustments made necessary by military service, just as the Federal Government met its obligation to assist industry in adjusting to war production and again to return to peacetime production, so there is an obligation to render assistance to those who suffer as a result of national trade policy. [H. Doc. #314, 87th Cong. 2d. Sess.]

In the debates on the bill, a number of Senators and Representatives reiterated this principle of governmental responsibility. Thus, Senator Mansfield stated:

> These import-affected workers would not be casualties of supply and demand or any other impersonal economic force. Instead, their unemployment would be directly attributable to a decision of the Federal Government taken in the national interest. Certainly, the Federal Government would owe a special obligation to those injured by such actions.

This philosophy of governmental responsibility to compensate private citizens injured in the interests of national policy was expressed by many other members of the House and Senate in the 1962 debates. In that instance there was no agreement by the United States, through tariff reductions, to permit foreign countires to set their own "adequate" price on American products. The mere threat of decreased protection to American industry and labor under the Trade Expansion Act provoked the strong and justified response of the Administration and Congress that the Government must compensate for private injury caused by concessions to public policy.

Obviously, therefore, where American goods and services—the intellectual products of American authors and publishers—are concerned, we look forward with confidence to the reinforcement of the philosophy of the Senate as clearly expressed in the Trade Expansion Act of 1962.

RECOMMENDATIONS

In concluding our testimony, we recommend that this Committee reject ratification of the Paris revision of the Universal Copyright Convention. At the very least, we urge that this Committee delay any action on ratification of the revised Universal Copyright Convention until it has made careful study of the effect of the Paris concessions on American authors and publishers, and after the attitudes of other developed countries have been expressed by formal action of their governments.

Recognizing that the issue of domestic compensation is not within the jurisdiction of this Committee, we urge that in reporting its decision to the Senate this Committee express its concern for the injury to American authors and publishers which will accompany ratification and recommend the adoption of appropriate remedial legislation, as was done in the case of the Trade Expansion Act, in the event the treaty is ratified.

(Exhibits A through D submitted by Mrs. Linden appear in the Appendix on p. 83.)

The CHAIRMAN. The next witness is Mr. Dan Lacy. I think we can run until 2:00. We are going to have a vote on the pending bill by 2:00 o'clock, but I think we can go through another witness.

Mr. Lacy, is he here?

Mr. LACY. Yes, sir.

The CHAIRMAN. Mr. Lacy, will you excuse me? I want to call the floor and see what the situation is. Just a minute.

Mr. Lacy, will you proceed, sir?

STATEMENT OF DAN LACY, SENIOR VICE PRESIDENT, McGRAW-HILL BOOK CO., ON BEHALF OF THE ASSOCIATION OF AMERICAN PUBLISHERS; ACCOMPANIED BY LEO ALBERT, PRESIDENT, PRENTICE-HALL INTERNATIONAL; W. BRADFORD WILEY, CHAIRMAN AND CHIEF EXECUTIVE, JOHN WILEY AND SONS; RICHARD P. SERNETT, SECRETARY AND GENERAL COUNSEL, SCOTT, FORESMAN; AND ROBERT W. FRASE, VICE PRESIDENT, ASSOCIATION OF AMERICAN PUBLISHERS

Mr. LACY. I am here testifying on behalf of the Association of American Publishers. I am myself Senior Vice President of the McGraw-Hill Book Company, which is perhaps the largest publisher of educational material in the country, certainly one of two or three.

With me here at the table are Mr. Leo Albert, who is the Chairman of the International Trade Committee of the Association of American Publishers and President of Prentice-Hall International; Mr. Bradford Wiley who is the Chairman of John Wiley and Sons, along with Prentice-Hall and McGraw-Hill one of the largest educational publishers with a large international stake. Mr. Wiley is past President of the Association of American Publishers; Mr. Richard Sernett is Secretary and General Counsel of Scott, Foresman, one of the very largest educational publishers of the country, and Chairman of the Copyright Committee of the Association of American Publishers; Mr. Robert Frase, is Vice President of the Association of American Publishers in charge of the Washington Office, was the advisor representing the publishing industry on the U.S. delegation at the Paris Conference at which these amendments were adopted.

Mr. Chairman, I find myself in something of a difficulty. We have heard slightly better than an hour's testimony on behalf of two publishers. We here are representing some 280 publishers, the organized industry of the country, and while we don't want to take up any more of the committee's time than necessary. We are perfectly willing to waive the reading of my prepared statement which is offered for the committee's record. I do hope the committee would find it possible now or subsequently after adjournment to permit such exploration as the committee thinks necessary into some of the statements that have been made earlier today, so as to get the point of view of 85 percent of the educational book publishers and substantially 100 percent of other book publishers.

Mr. Chairman, I think it might be useful if we backed off for a moment from the discussion of technical details and tried to take a look at the larger, overall picture.

DEVELOPED AND DEVELOPING COUNTRIES

There has been a great deal of discussion about the vagueness of the definition of developing countries, and that is certainly true. I think it is of little practical importance. I think everybody is agreed that, by and large, what we mean by developing countries for this purpose is Latin America; Africa, except the Union of South Africa; and Asia with the exception of Japan and probably of Taiwan. By developed countries is meant North America, Europe, South Africa, Japan and Taiwan. I don't think there is any real difference on that point.

BERNE UNION MEMBERSHIP OF ASIAN AND AFRICAN DEVELOPING COUNTRIES

Now, the developing countries of Asia and Africa, all as colonies up until this generation, were members of the Berne Union as part of their metropolitan country's membership. When they achieved independence, most of them automatically took over the international obligation of their parent countries, and so practically all of the Asian and African countries became members of the Berne Union without having really given the matter any great consideration. It was sort of an automatic affiliation not involving any necessary deep commitment or loyalty.

COPYRIGHT PROBLEMS OF DEVELOPING COUNTRIES

Those countries never really faced copyright problems very much until the last decade. For one thing, until very recent years, there was no really serious effort to educate the masses of the people of those countries; there was no real need to produce educational materials. What they got were sent to them by their parent countries.

As their own independent efforts to develop education suitable to their people came up increasingly they realized that it would be necessary for them to produce a great mass of materials, a part of which they thought would need to be translations or adaptations of Western materials. Thus for the first time, really, they confronted the copyright question in their countries.

That confrontation led them to express a good deal of dissatisfaction with the existing structure and most of them—not all of them but most of them—took the position that they were quite willing to pay for whatever they needed to use.

The one thing that they as sovereign powers responsible for the social and economic development of their countries were not willing to accept was a situation in which their access to the advanced science and technology and medical knowledge of the world embraced in copyrighted publications in developed countries could be arbitrarily withheld from them, not because of money but because of indifference or resistance of another kind.

The CHAIRMAN. From what?

Mr. LACY. I am sorry; could not be withheld from them because of indifference or resistance of one sort or another.

One of the complaints the developing countries repeatedly made was that they would apply for permission to translate a work to a Western publisher and simply never get a reply, and that probably happened. A fairly small Western publisher would get a letter in poor English from some publisher in a developing country that he had never heard of, asking for permission to translate a work into Urdu and it just never got answered; it never got attended to.

They, I think, attributed much more importance to this copyright question than it really had—as I don't think copyright was really any serious limitation on their educational development—but they felt it was.

They came to Stockholm in 1967 and managed to persuade the countries in the Berne Union there to agree to a Stockholm Protocol that would have sweepingly weakened copyright protection.

CONCESSIONS IN 1971 UCC NOT EQUIVALENT TO STOCKHOLM PROTOCOL

Mrs. Linden in her testimony said that the concessions in the 1971 UCC were equivalent to the Stockholm Protocol. That simply is not so; it is simply a misrepresentation of the fact.

The Stockholm Protocol had no limitation on export of anything that was done under compulsory license, a compulsory license where anything could have been taken in 3 years flat. There was a vague reference to just compensation, but there was no test as to what just compensation was, as in the revised UCC. And, in addition, a section of the Stockholm Protocol gave the developing countries the right to limit in any way they chose the economic rights of authors as they found it necessary in connection with the educational or scientific, cultural development of their countries.

Now, nobody ratified the Stockholm Convention, that is, no major country. Bulgaria and Senegal did, but nobody else did and it has not come into effect.

STEPS ENABLING DEVELOPING COUNTRIES TO LEAVE BERNE UNION

Now, it has been suggested that the developing countries did not as they threatened they might, resign from the Berne Union when Stockholm was not ratified. But they set in motion a series of very calculated steps that would enable them to leave.

Mr. Chairman, I am sorry to be technical on this point but I have to be to explain it.

The Universal Copyright Convention requires no minimum protection of the works involved. It does not require that any rights except translation be respected; it merely says a UCC country has to extend to books and other works of other countries and authors of other countries in UCC the same protection it gives its own. If you give your own authors very low protection, you can give foreign authors very low protection. Berne has relatively high specified standards of protection.

Now, there is also a provision of the present UCC that if you belong both to Berne and UCC and you leave Berne, you cannot receive UCC protection in Berne countries.

Now at the present time, as long as a country belongs to both Berne and UCC, Berne puts a floor under UCC. You have to give high protection because of Berne. UCC requires you to give the same protection to everybody; so Berne automatically puts a floor under UCC.

Now, if these developing countries could leave Berne and stay with UCC, they could set their standards of protection as low as they wished but still as UCC members enjoy the relatively high protection given to countries of Europe and the United States. That is what in fact they proposed to do and if anybody believes that was an idle threat and they didn't mean to do it, he was just not listening.

It takes ten countries to submit an application to have a revision conference of UCC. They had well over the ten. They could have forced this; it was everybody's understanding and agreement that this could not be defeated, that UCC would be amended to let a country remain in UCC after leaving Berne. I think it is perfectly clear that we were confronting in 1969 a situation in which all the major

Asian countries were prepared to leave Berne, and within UCC apply an extremely low level of protection in the educational field.

STUDY GROUP OF 26 COUNTRIES

This looked like it was going to produce a collapse of international copyright generally. The United States—the Copyright Office, Mr. Kaminstein, who was then the Register, and the State Department—took the initiative to rescue this situation. They, in meetings in Paris in the spring of 1969, got through an agreement to withhold any UCC revision action, and instead of going into this precipitate, destructive conference, to set up a study group of 26 countries, 13 developing, 13 developed, which would meet in private, and informally to study the whole question. These were experts, not diplomatic representatives.

These experts met in Washington in September and October of 1969. I was there as the representative, as the observer, for the International Publishers Association—our international association. The 26 countries in effect, reached agreement to agree, not yet really an agreement. The developing countries, I think, in all good faith said, "Look, we will come back; let's try again; let's work something out. Let us leave Berne if we want to, but let's put a floor in UCC so that in some regard at least, UCC would give as good protection as Berne. Then let us put some concessions in both treaties that will meet the needs of developing countries without really injuring the developed countries."

TRANSLATING AGREEMENT TO AGREE INTO CONCRETE TERMS

That was agreed to, and a drafting committee was appointed which met in Paris and Geneva in the spring of 1970, at which I was also present, which translated this agreement to agree into concrete terms.

This wasn't as difficult as it sounded, because on the one hand you had developed countries that said, "We are not trying to keep our materials from being used in the developing countries; we want them used; we only want to be paid."

You had developing countries who said, "We don't mind paying you; we just want to be dead sure we can get the material. We are sovereign countries; we are responsible for the education of millions of our residents and we can't have a situation where a publisher can sit in London and say 'I don't care if you are willing to pay for it or not; you can't publish anything out of this medical book'—that sort of thing."

COMPULSORY LICENSES

So it was agreed that there would be a series of compulsory licenses, carefully graded. The right to translate a work into a local language such as Hindi or Gujarati is commercially relatively unimportant. It is very dear to Indians. On that point it was agreed that a compulsory license could be issued for a relatively brief period, a year plus a 9-month period.

For translation into world languages such as Spanish, French, and English, commercially important, it would be 3 years plus a 6-month term; for reproduction in the original language, which is the commercially most important element—for example putting out a cheap

photo offset edition in English—a much longer period, running up to 7 years in the case of literary works.

Now this compulsory license could be issued only if the original proprietor had after this waiting period—one year, three years, five years or seven years—either not brought out an inexpensive edition, marketed in the country or had not authorized a translation into the language in question. If after that time he got an application he had another 6 or 9 months to make an arrangement before a compulsory license could be issued. That is, the compulsory license couldn't be issued if the original proprietor had shown any interest in himself benefiting from the work or if any commercial publisher in the country itself had realized that there was commercial value here and had made a voluntary agreement.

Under the compulsory license, moreover, full payment had to be made, not "just" compensation, not merely payment in terms of what that country internally thought fair, but at the rate of normal and freely negotiated contracts between the developed and developing countries.

Now, of course, this is subject to abuse if it is not carried out in good faith, but so is the present treaty subject to precisely the same sort of abuse. Any treaty is.

If any work is expropriated—and the word "expropriation" has been thrown around very loosely all morning—if any work is expropriated it is not under the terms of this treaty; it is precisely in violation of this treaty, which guarantees under any compulsory license the payment of what would have been in comparable circumstances the full royalty rate of freely negotiated contracts. So the relatively objective standard here is a good deal higher than the standards of fair value and just compensation in international law generally.

Moreover, if the educational or other publisher involved finds that he made a mistake in not having exploited this himself and left it up to the local country to issue a compulsory license, he can come back in the market at any time and bring out his own edition. If he feels he is hurt, wham, that compulsory license is invalidated immediately as soon as he takes steps to work the thing himself. All it says is that he can't be a dog in the manger, neither produce nor license anybody else to produce it for normal rates.

DAMAGE UNDER TREATY AND IF DEVELOPING COUNTRIES WITHDRAW

Now, the world has been described to us this morning as a hobgoblin that is hardly recognizable to any of us who represent most of the major publishers in this country, who really live in this world and make a substantial part of our income in it and deal with it every day.

Let me say, of course, it is not a perfect treaty. If I would unilaterally lay down the law for the world, I would lay down a unilateral law that would serve my unilateral interests.

It is in the nature of agreements that they are never precisely what either of the contending parties would have preferred as ideal. Nevertheless, it does seem to me that the damage to us under this treaty is relatively small. I would like to point out that the damage, if the developing countries, as I think there is no real doubt most of them would, would withdraw from the Berne Convention and from

an unmodified UCC, is very different from this. Mrs. Linden has suggested that it didn't make any difference whether a country stayed in UCC as modified or got out of international copyright obligations entirely—which is nonsense. If a country is out of a treaty completely, not only may its government but any citizen, any outside person, any Frenchman or German or American who wanted to move there and start a business, could pirate any book by photo-offset in any language he wanted. We saw that happen in Taiwan. That is very different from this very careful regulated series of licenses; limitation on export; and subject to recall anytime any American publisher would wish. That is all I have to say, sir.

(Mr. Lacy's prepared statement follows:)

PREPARED STATEMENT OF MR. DAN LACY, SENIOR VICE PRESIDENT, MCGRAW-HILL BOOK CO., ON BEHALF OF THE ASSOCIATION OF AMERICAN PUBLISHERS

Mr. Chairman: My name is Dan Lacy. I am a Senior Vice-President of the McGraw-Hill Book Company, and am testifying on behalf of the Association of American Publishers. The Association is the general association of book publishers of the United States. Its 280 members and subsidiary company are believed to produce about 80% or more of the dollar volume of books published in this country. I am grateful for the opportunity granted by the Committee to set forth the Association's emphatic support of prompt ratification of the Act of Paris revising the Universal Copyright Convention.

I have had the opportunity for rather close familiarity with this particular treaty, with the circumstances of its negotiation and with the underlying international copyright problems to which it is addressed. For thirteen years (1953–1966) I was Managing Director of the American Book Publishers Council, one of the two organizations that joined to form the Association of American Publishers. Since that time I have been a member of, and for four years chaired, the book-publishing industry's Copyright Committee. In the development of this particular treaty, I served as an observer attached to the United States delegation to the meetings of the Intergovernmental Committee of the Universal Copyright Committee and the Permanent Committee of the Berne Union in Paris in February 1969; as the observer on behalf of the International Publishers Association at the International Study Group on copyright in Washington in September and October 1969; as an observer attached to the United States delegation to the meetings of the drafting committee working on the preliminary draft of the treaty in Paris and Geneva in May 1970; and as a member of the State Department's Advisory Panel on International Copyright.

Mr. Ladd in his testimony on behalf of the State Department has well presented the content of the treaty and the problems to which it relates. Perhaps, however, I can add some observations on behalf of private enterprise.

As the Committee is aware, there are two principal international copyright treaties. The Berne Union is the older one, dating back to 1886, and adhered to by all major countries except China, the Soviet Union, and the United States. It requires a basic protection of all the rights of an author for the remainder of his life and for fifty years thereafter, without requiring any such formalities as notice, registration, deposit of copies, or domestic manufacture. The Universal Copyright Convention, drawn up under the auspices of UNESCO in 1952, was frankly intended to provide a means for the United States to join a comprehensive international copyright treaty. With a minor exception in the case of translations, it requires no specified minimum protection—only that each member country must give the works of authors of other member countries the same protection it gives its own. It permits the requirement of notice and as to term stipulates only that it must be at least 25 years from the publication of a work. In other words, it provides a much lower level of protection that the Berne Union. This made it possible for the United States to adhere, as did most Berne Union members.

To avoid conflict with the Berne Union, the UCC provides that in relations between countries both or all of which adhere to both treaties, the Berne Treaty shall govern. It also provides that if an adherent of both treaties leaves the Berne Union, it must leave the UCC as well. Finally, for all countries that belong to both treaties, Berne in effect provides a "floor," a requirement for minimum protection, for UCC as well. For example, since Berne requires the protection of

performance rights, a Berne country, by giving this protection to its own authors must, under UCC, give it to American authors as well, even though UCC in itself has no such requirement and though a country, like the United States belonging only to UCC, is not required to offer that protection unless it chooses to grant it to its own citizens.

This rather complex background helps us to understand the importance to the United States of the Stockholm Protocol to the Berne Union, which was signed by representatives of most of the delegations to the Stockholm conference to revise the Berne Union in 1967—an event of bombshell proportions, even though the United States does not itself adhere to that treaty and was only an observer at Stockholm.

At the Stockholm conference the delegation from India, undertaking to speak for the developing nations generally, denounced in rather inflammatory terms an international copyright regimen that in their view left the developed countries in a position unilaterally to decide what of their educational, scientific, and cultural materials could be made available in the developing countries and on what terms. They demanded major modifications of the Berne Union as the price of staying in. The conference responded by drawing up a protocol that gave developing countries the right three years after the original publication of any work to license translations of the work into any language, and to export it to any country—all without the permission of the copyright proprietor—if the proprietor himself had not arranged for a translation into the language in question or a reproduction in the original language in the country issuing the license. It required an undefined "just compensation" to the proprietor if the work were less than ten years old, but nothing thereafter. Section I(e) in addition gave a sweeping right to limit the rights of authors in any way required for the use of materials for "teaching, study and research"—in other words, essentially to ignore copyright entirely.

Though the Stockholm Protocol was signed by most of the members of the Berne Union attending the conference, there was an outraged response by authors and publishers in all developed countries, and no major country ratified it.

The developing countries, led by India, were of course deeply disappointed and offended by the failure to ratify the agreements made at Stockholm. There was an initial reaction toward renouncing all copyright conventions; but instead the developing countries demanded a diplomatic conference on the UCC that would delete the article requiring a nation leaving Berne to leave UCC as well. They had the necessary signatures to force such a conference. If that objective were obtained, the developing countries would all have dropped out of Berne. Though remaining in UCC and enjoying a high level of protection for their works in the developed countries, they could have set the levels in their own countries as low as they liked, because the floor would have been pulled out from under UCC.

This produced a real crisis. At a time when the communications links around the world are growing closer and closer, when the satellites bind us together, when we need urgently to share our science, our technology, and our cultures—and hence when a sound international copyright structure was never so desperately needed—we faced the prospect of a collapse of that whole structure.

At this juncture the United States, which had been forced by its nonmembership in Berne to sit on the sidelines, assumed leadership, a leadership which the State Department and the Copyright Office have carried through with remarkable success. The United States suggested that a study group be set up consisting of experts from 26 countries, half developing and half developed, to review the whole range of international copyright problems. The study group would meet in private, with no observers except one each from several major international non-governmental organizations involved, and would work informally. The group was invited to Washington and convened there in September 1969. A fundamental compromise was reached by the Study Group: governments would be given the right to withdraw from Berne while remaining in UCC as the developing countires demanded, but a floor would be put under the UCC comparable except for length of term to the minimum requirements of Berne. And concessions to the developing countries would be worked out that would be more realistic than those of the Stockholm protocol, which would be incorporated in both Berne and the UCC.

At this stage we had little more than an agreement to agree. All its substance remained to be worked out. It was provided that the governing committees of the two treaties would meet in Paris and in Geneva the following spring to draft specific provisions to carry out the intent of the Washington agreement and to arrange for a concurrent diplomatic congress to adopt the necessary revisions of the two treaties.

Again the United States took the lead. Its delegation came to Paris in May 1970 with a carefully worked out draft that became the basis for the UCC discussions and, except for technical aspects of the Berne revision, for the discussions of that treaty as well.

This draft contained two basic proposals on which the final settlement was based. All along, the developing countries indicated that their principal concern was their freedom to translate materials from the major western languages into their own national tongues which did not have an adequate representation of modern scientific knowledge. Authors and publishers of developed countries, on the other hand, had relatively little concern about translations into languages peculiar to the developing countries, like Arabic, Bengali, Urdu or Sinhalese. Their concern was rather with translation into such commercially important languages as English, French, German, or Spanish, and even more with the possibility of inexpensive photo-offset reproduction of the original work, which had been such a plague in Taiwan.

Both these positions could be met by recognizing three different operations: reproduction in the original language, translation into "world" languages, and translation into languages used only in the developing countries. Liberal provisions could be offered for the last, with a more restrictive one for translation into world languages, and much more restrictive provisions for reproduction in the original language. This scheme of classification became central to the treaty provision.

A second area of compromise lay in the fact that the developed countries expressed no opposition to the availability of their materials in developing countries; indeed they wanted to encourage that availability in every reasonable way so long as their authors and publishers were properly recompensed. At the same time, the developing countries, led by India, took the position that they were interested only in assuring the availability of materials for educational and cultural uses in their own countries, that they were willing to pay all reasonable royalties, and that they were not interested in the commercial exploitation of the material. Their one goal, they asserted, was the right not to have their people denied access to materials because of a failure of western publishers to respond to requests, or to approve licenses, or because of prohibitively high royalties.

From these two not very contradictory positions was put together a proposal that met the needs of both sides reasonably well. Developing countries would be given the right to issue compulsory licenses to permit the publication of materials needed in their own countries for specific instructional purposes if the proprietors had not acted within a specified period time to make them available. This period time, as the treaty was finally worked out, varied from one year in the case of translations into a developing country language such as Gujerati up to seven years in the case of the reproduction of a literary work in the original language. No such license could be issued if the copyright proprietor had during that time made a translation into the language in question, or in the case of reproductions, an inexpensive edition in the original language, and made it available in the country in question. There was no requirement that the proprietor publish an edition in the country to estop a compulsory language. For example, an inexpensive American paperback edition, if made available in India, would bar a compulsory license for an Indian reproduction. Similarly if a Spanish language edition were brought out under a regular license in Mexico and marketed throughout Latin America, it would bar a compulsory license for a Spanish translation in Peru or Colombia. Finally, even after the expiration of the appropriate period of 1 to 7 years, a formal request for a license must be made to the proprietor, who had 6 to 9 months in which to act before a compulsory license could be issued.

On the other hand, the export of works produced under a compulsory license was forbidden. And most important, payment of full royalties at the level normal for freely negotiated international publishing contracts would be required.

There were some modifications of this basic proposal in the final form of the treaty, notably a provision that two or more developing countries issuing compulsory licenses for the same work could produce a single edition that could be exported to the other country or countries. We regretted this change, as the provision is subject to possible abuse. However, there are some legitimate ends to be served—such as a joint project of the Central American republics to produce elementary school readers. And the right of the proprietor to license his own edition if any commercial opportunities are apparent may be protection enough.

We are now in a position in which we have before us the possibility of a constructive outcome of what only three years ago appeared a desperate crisis. It is an outcome largely made possible by American initiatives. If we can consolidate that outcome through a ratification of the revised Universal Copyright Convention, we will be in a position to move on to further steps in enlarging the scope and raising the level of international copyright protection. In this way we can pave the

way toward a richer educational and cultural exchange among all countries, and especially between the developed and developing worlds, to their mutual benefit. And perhaps we shall be able to move several steps closer toward the day when Russia and China, the two great powers now having no international copyright bonds, will want themselves to join UCC.

But prompt American ratification is essential to this. By its own terms, the Act of Paris, which is the parallel revised Berne Convention, will not come into effect until the United States—along with France, Great Britain, and Spain—ratifies the revised UCC. But beyond this legal requirement, we are so clearly identified with this treaty in the eyes of the developing countries that our failure to ratify would be a tragic disillusionment. For several years now the developing countries have deferred any other action, relying on the good faith of the developed countries as embodied in the UCC and Berne Conventions as revised in Paris. If once more the developed countries fail to ratify an international agreement on this subject, and this time one drawn to meet the primary objections of the developed countries, I am satisfied that we will confront a situation in which the principal developing countries may withdraw from international copyright altogether; and those that remain will give only a grudging and resentful observance of its requirements.

The result could be catastrophic. We have seen the consequences of having even a small country like Taiwan free to pirate American books by quick and inexpensive photocopying. In that case, we had sufficient influence with the Chinese Nationalist government to persuade it to forbid the export of pirated editions, which to some degree limited the damage. Countries like India and Pakistan are far larger, and if embittered toward us on the copyright front they would have no reason to restrain exports. A flooding of pirated editions could undercut the markets of all American books and the income of all American authors and destroy hopes of constructive collaboration in the joint development of educational materials for the developing nations of Asia and Africa.

Much concern has been expressed about the erosion of the rights of American authors and publishers. To a degree we share that concern. Certainly if we could draft unilaterally a copyright treaty to govern the world it would be different. But it is inherent in agreements among parties of differing interests that no agreement is exactly what either of the parties desired. This is not a situation, however, where one party's gain must come at another's loss. Both developed and developing countries have a vast deal to gain from the continuation of a sound, mutually acceptable international copyright structure. Certainly our gain from the preservation and enlargement of such a structure vastly, indeed incomparably, outweighs any possible loss from the treaty.

It has also been objected that the proper enforcement of the treaty will depend on the good faith of the developing countries. That is of course true, but it is true of the present treaty; it is true of the protection of American property abroad under all treaties and under international law generally. The negotiations leading to the treaty revision were conducted with good faith on both sides. That good faith can the more confidently be relied on if we now go forward with the ratification of this Act. If we reject, it we will seriously damage the grounds for good faith and cooperation on which we must rely under any legal arrangement.

Mr. Chairman, I am confident that in advising and consenting to the ratification of this revised Universal Copyright Convention, the Senate will have achieved a major and lasting step toward sound international copyright relations and toward the fruitful cultural and educational relations that require copyright as an indispensable base.

DIFFERENCE BETWEEN VIEWS OF WITNESSES REPRESENTING PUBLISHERS

Mr. CHAIRMAN. Mr. Lacy, could you give to one not very deeply immersed in these matters any reason why there is such a great difference between your view, representing publishers and Mrs. Linden's view, representing publishers? What accounts for such diametrically opposed views?

Mr. LACY. I wish I knew, Senator. It is not just my view it is the view of every substantial publisher in the country.

The CHAIRMAN. What?

Mr. LACY. It is not just my view, sir; it is the view of every substantial publisher in the country except the two represented by Mrs. Linden, and I am at a loss to account for it.

The CHAIRMAN. Can't you give any suggestion as to why? Do they have a different kind of business from yours?

Mr. LACY. No, sir.

The CHAIRMAN. Do they cater to a different part of the world? Is there no difference at all that you can think of?

Mr. LACY. I think it is probably true that companies like Prentice-Hall and Wiley and McGraw-Hill have a larger stake in the export business.

The CHAIRMAN. Is what?

Mr. LACY. I expect it is true that companies like McGraw-Hill and Prentice-Hall and Wiley, for example, all of whom happen to be represented here, probably have a larger stake in international publishing than do Crowell Collier, Macmillan and Harcourt, although their stake is large. We have subsidiary companies in India, for example, in Mexico and Panama and Singapore, as well as in most developed countries.

The CHAIRMAN. Will those companies be entitled to have these compulsory licenses?

Mr. LACY. They could apply for them, but it really wouldn't be necessary because we would license them anyway if there were any interest in producing the materials.

The CHAIRMAN. Could they get a compulsory license on somebody else's material in India, not just on what you already have in America.

Mr. LACY. If there were a work which the original proprietor did not want to publish——

The CHAIRMAN. That is what I mean——

Mr. LACY (continuing). And if the Indian Government chose to issue a compulsory license, the Indian Government could grant that license to any publisher in India it wished, including one of our subsidiaries.

DIFFERENCE BETWEEN PUBLISHERS

The CHAIRMAN. I am not trying to suggest anything because I am not familiar with the business. But could the difference be that those two publishers do not have foreign subsidiaries and that you do? Is that a difference?

Mr. LACY. I think the fact——

The CHAIRMAN. An economic difference?

Mr. LACY. I don't think it makes any significant economic difference, Mr. Chairman. I think it may mean that we have had more occasion to focus on this problem; in general it is more important to us; we have lived more with it. I don't think it makes any difference in the economic interests involved——

Mr. CHAIRMAN. Do you and your companies do any substantial business involved with foreign governments? Do you furnish USIA and these other people a lot of books?

Mr. LACY. The USIA buys a considerable number of books from every publisher.

The CHAIRMAN. I mean more from you than from the others represented by the preceding witness?

Mr. LACY. I would guess it probably buys more from Crowell Collier than from McGraw-Hill, but that would be because those companies have much more trade in those departments than McGraw-Hill.

The CHAIRMAN. Is there any difference in the emphasis? Are theirs strictly textbooks and yours more in the field of business and technological studies of that kind?

Mr. LACY. No, I don't think, Mr. Chairman, there is any difference in what the interests are. I suspect the difference is in how the interests are seen.

The CHAIRMAN. Do you mean there aren't any differences actually? You just view this differently?

Mr. LACY. That is my impression.

The CHAIRMAN. This is not an unusal fact. I find that true in the Senate. I cannot understand most of my colleagues.——

[Laughter.]

The CHAIRMAN (continuing). In wanting to spend all our money for arms, but anyway that difference exists.

Mr. LACY. I don't want to suggest, Mr. Chairman, that these views I have expressed are peculiar to me or the company I work for. Perhaps Mr. Wiley would like to add a word.

Mr. WILEY. Senator, I am glad to be before you again. I was here one time on a very lively day when we were talking about IMG (U.S. Informational Media Guaranty Program). I remember with particular fascination the developments of that discussion.

WITNESS' EXPERIENCE

I am not a lawyer; I am not a copyright expert, but I am a publisher of educational books, technical and scientific reference books. I have served the industry in a variety of capacities. I have also been chairman of the Government Advisory Committee over in the State Department. This year alone, as an example of my extensive firsthand experience, I have been once and a half around the world and I have just finished a little more than half the year.

U.N. MEMBERSHIP AND TREATIES' MEMBERSHIP MUST NOT BE CONFUSED

As a practical matter, to pick up one of the points that got a little hung up earlier, Senator, we must not confuse the membership of the U.N. with the membership of treaties. Quite obviously, small countries, which I have seen, such as Rwanda, have no interest whatsoever in being a member of any international copyright treaty. There is no interest, no reason, no purpose served.

The total membership of the UCC, I believe, was cited as being about 61 which probably represents about the number of countries now members of the U.N. who would be interested in being party to an international copyright convention.

EXAMPLE OF JOHN WILEY AND SONS

John Wiley and Sons is an example of a firm which has subsidiaries in developing countries and in two of them we are publishing books at the school level. Obviously, we would not take that calculated risk

if we thought we were in jeopardy either under the present UCC or the one that is before your committee for consideration. In my opinion, the latter treaty is more than ample for anyone's reasonable purpose.

We also happen to be in partnership in three countries which probably would be defined as developing countries. We find no problem there, as Mr. Lacy cited.

WITNESS' MEETING WITH SINGAPORE OFFICIALS

I had occasion during the winter when I was in Singapore to meet with some of the officials of that new city-State to discuss the reasons why they should have a modern copyright statute but, more important, why they should join the convention which I, with confidence, assumed that the U.S. would soon ratify. This led to an exchange of letters with the Minister of Culture. I pointed out to him that Singapore was in prospect of being a very important graphic arts center. Publishers around the world would produce books there. Many of us would be in Singapore for one reason or another very soon provided we had all possible copyright protection, and this he accepted as a very reasonable statement. I cited the horrible example of Taiwan and the good example of Japan.

ROYALTY PAYMENTS FROM DEVELOPING COUNTRIES

Royalty payments from developing countries are ephemeral things. I am afraid there has been a little confusion introduced here this morning, Mr. Chairman, because for the life of me I can't imagine where those great sales would arise in countries which barely are publishing, which usually have to buy books. They have relatively few facilities for translating except under heavy subsidy. I really don't think the prospect of losing something we don't already have is serious.

The realities are that royalties are being paid to my company and to the companies that have been represented here. I believe this will continue regardless of what——

ADVANTAGE OF NEW AGREEMENT

The CHAIRMAN. What is the advantage of this new agreement, then?

Mr. WILEY. The biggest advantage, Mr. Chairman, is that the developing countries will become important. As a realistic publisher who has traveled the world in this regard for many years, I am convinced that publishing has grown to a point where further growth will largely come because we will aid and abet the development of indigenous publishing and by so doing we will serve our own enlightened self-interest. The more literate people there are in the world, the more books will be sold. Because the U.S. happens to be the most important, most highly regarded book publishing country in the world, there is no question that growth of publishing in developing countries will lead to a greater market for our books. It is going to be a long time coming. You have to sort of take a pragmatic, idealistic point of view, if you will, but I can't see any real danger to a firm such as ours or members of our association, of which I have just finished two years as chairman, suffering from this convention.

SIGNERS OF UCC WHICH ARE DEVELOPING COUNTRIES

The CHAIRMAN. How many of these countries which have signed the UCC are developing countries, in your opinion?

Mr. WILEY. This is the usual argument, you see.

The CHAIRMAN. What is your opinion?

Mr. WILEY. Well, I wouldn't call some of them developing. I certainly would not consider Brazil, where we have a partnership, a developing country. I find in talking as I wander around the world and, as I say, do a great deal of this, that if you spoke to a publisher and suggested that he was in a developing country and therefore he needed some special concession, he would probably take offense. I doubt that they will take advantage of any developed countries' product except by default on the part of the developed country failing to facilitate access to copyrights. This is a very serious matter which I am personally familiar with because I pursued this in other countries where time and again the complaint is, "Well, we never get an answer; we never get an answer." The money is inconsequential, even if 10,000 books were sold.

WHY DON'T PUBLISHERS ANSWER LETTERS?

The CHAIRMAN. Why don't they answer the letters? Why wouldn't they get an answer?

Mr. WILEY. Publishers just don't know and don't pay any attention.

The CHAIRMAN. I mean, why?

Mr. WILEY. There is very little money involved.

The CHAIRMAN. You mean publishers are more negligent of their good manners than other people? Most people answer.

Mr. WILEY. Only a small part of the publishers in the U.S. are in any way actively concerned with the international aspects of publishing.

The CHAIRMAN. They are just not interested?

Mr. WILEY. Not interested.

The CHAIRMAN. I see.

Mr. WILEY. Of course, you have the further problem that as so often occurs, the author has an agent and the agent looks it over and says, "Oh, well, a couple of hundred dollars; why should I bother if my commission is inconsequential?"

BASE OF ROYALTY PAYMENTS

But I think it is very important in the matter of royalty payments, Mr. Chairman, to recognize that throughout the world royalty payments are based not on the prices at which the publisher who issues the license sells his book, but the price at which the book is sold in the other country.

The CHAIRMAN. Which is much smaller?

Mr. WILEY. Yes, which is infinitesimal by comparison with dollar prices.

The CHAIRMAN. Even with the devaluation of the dollar?

Mr. WILEY. Well, I wish that some of the contracts our company had signed in recent years had provided for payment in local currency; we would have been a lot happier. Unfortunately, it was not.

Thank you, sir.

WITNESS'S POSITION ON REVISED UCC

Mr. LACY. Mr. Chairman, If I could just take one moment to add one thing. I did not mean, perhaps in heated statement, to indicate there is no reason to feel that there are parts of this treaty that in a perfect world we would not have wanted differently. There are possibilities that——

The CHAIRMAN. I didn't understand you to mean the revised UCC was perfect, but on balance you are for it and say it ought to be ratified. Is there any doubt about that?

Mr. LACY. Not at all, sir, emphatically. The dangers of one or more language countries leaving copyright completely and being in a position to have any businessman set up a business there, able to produce by offset in English any book he wanted and sell it wherever he could find a buyer, would be catastrophic and it is a risk we can't run.

EFFECT OF U.S. DECLINING TO RATIFY

Let me say one word further. Under the terms of this treaty neither the amendments of UCC nor the partial amendment of Berne, which is not up before the Senate because we are not members of Berne, can go into effect until four countries, one of whom is the United States, has ratified. So that if we decline to ratify we will have vetoed. We will not merely have dealt ourselves out, we will have vetoed for the whole world an effort to reconstruct and perpetuate the international copyright structure. The opportunities thereafter to rely on the good faith of the developing countries, in which I feel considerable confidence now, will be seriously diminished and any copyright agreement, whatever it says in the treaty, has to depend on good faith and loyal reinforcement. Copyright is not a tangible piece of property, it is something that exists in the law and as it is enforced in the courts of the countries concerned. Only if we have an international system, all the members of which agree meets their interests, has been considerate of their needs, and are prepared to support, can we really hope to protect our works around the world.

The CHAIRMAN. I am going to have to conclude this. We have gone on longer than I expected now.

I don't know what to do about Mr. Lieb.

Mr. Lieb, do you have a short statement that you can submit for the record?

STATEMENT OF HERMAN FINKELSTEIN, SECTION OF INTERNATIONAL LAW, AMERICAN BAR ASSOCIATION; ACCOMPANIED BY CHARLES H. LIEB, SECTION OF PATENT, TRADEMARK, AND COPYRIGHT LAW, ABA

Mr. FINKELSTEIN. Mr. Chairman, I am Herman Finkelstein. Mr. Lieb is at my left and we both appear for the American Bar Association. It would just take 2 minutes to summarize the statement.

The CHAIRMAN. I have to leave. We have a quorum going and I have to go right away.

ABA CONSIDERATION OF CONVENTION

Mr. FINKELSTEIN. First, I would like to correct the statement that has been made here that the American Bar Association gave only skimpy consideration to this convention. There was a very lengthy report filed with the Committee on International Law which I represent here and I would like to hand that in for the record, Mr. Chairman. (See Appendix, p. 126.)

The CHAIRMAN. Yes.

Mr. FINKELSTEIN. And a very lengthy report filed by the Committee on Patent—by the Section on Patent, Trademark and Copyright Law of the Association, and I would like to hand that in. (See Appendix, p. 146).

ABA POSITION ON CONVENTION

The CHAIRMAN. Tell me; are you in favor of the convention?

Mr. FINKELSTEIN. We support the convention.

Mr. Chairman, we are in this position: We can't decide what kind of a treaty we would like. There are many nations involved here and we face this fact that the developing countries were able to go to Stockholm in 1967 and upset the whole pattern of the Berne——

The CHAIRMAN. We have had all that testimony. I just want to know what you think about this convention.

Mr. FINKELSTEIN. I favor, and the American Bar Association favors it.

The CHAIRMAN. You favor it. Was your committee which considered it fairly unanimous about it?

Mr. FINKELSTEIN. Yes, sir. The International Law Council was unanimous and I will ask Mr. Lieb about the International Patent, Trademark and Copyright Section.

Mr. LIEB. The Patent, Trademark and Copyright Section was unanimous in recommending expedited favorable action in the House of Delegates in its February meeting because of the American Bar Association's view of the urgency of speedy ratification.

URGENCY OF RATIFICATION

The CHAIRMAN. What is the urgency?

Mr. LIEB. The urgency is that, in our view, the world is waiting to see whether the United States will fulfill its commitment to go along with these revisions because if the United States——

The CHAIRMAN. What happens if they don't? What is your answer to Mrs. Linden's testimony? Did you hear it?

Mr. LIEB. Well, Mrs. Linden seems to be taking a minority view. All of the experts with whom I am familiar on the national and on the international level feel that unless these revised conventions are adopted, there will be a mass walkout.

The CHAIRMAN. Is she the only one you know that opposes this treaty?

Mr. LIEB. The only one I know with the exception of Irwin Karp whom you heard this morning.

The CHAIRMAN. He opposes it equivocally. He says he disagrees with it, but he doesn't really wish us not to approve it.

83-500—72——6

Mr. FINKELSTEIN. Mr. Chairman, if I may point out I was a member of the original delegation that went to Geneva in 1952. I was in Stockholm in 1967, in Paris in July, 1971.

Now, we are faced with this: If this present situation continues, and this revision is not ratified, then the Stockholm Protocol remains in the Berne Convention. Now, we do hope to have our domestic law revised within the next 2 years and when that is revised we hope to be in a position to join the Berne Convention. We will have had the term of copyright that we must have to join Berne, life plus 50. We expect to have the manufacturing clause either eliminated or modified so that we can join the Berne Convention, and we find that with respect to moral rights that the law in England is about the same as our own and members of the Berne Convention have no problem there. But if the Stockholm Protocol remains, then we can't join the Berne Convention without adhering to the Protocol, and that just destroys the whole fabric of copyright.

What we have here is this: In Paris we found a solution that preserved the fabric of international copyright and that is why the International Association of Societies of Authors and Composers (CISAC) adopted a resolution supporting adherence to both the Berne and the UCC because there you have both sets of countries involved, and they did express this thought that although favoring ratification, including measures that will aid educational activities of developing countries, CISAC—that association—regrets that this should be done at the expense of authors by impairing their rights in the field of translation and reproduction rather than providing the financial subsidies at the expense of developed states. But, of course, there is no hope of getting that subsidy and in order to preserve international copyright the ratification of the Paris revision of UCC by the U.S. is essential.

The CHAIRMAN. I thank you, Mr. Finkelstein. Whatever you wish to——

AAP'S TAKING OF POSITION ON RATIFICATION

Mr. LIEB. Mr. Chairman, in answer to Mrs. Linden's suggestion that AAP, to which I am copyright counsel, heedlessly, thougthlessly and negligently took its position on the ratification of the treaty, I should like to submit only in answer to that a copy of a memorandum of June 2 which I wrote, commenting on Mrs. Linden's memorandum, addressed to Mr. Robert Bernstein, Chairman of the AAP and Mr. Sanford Cobb, President. (See Appendix, p. 148.)

I should also like to submit, if I may, one of the finest discussions of the Paris revision which I have read, which is an article by Barbara Ringer, former Assistant Register of Copyrights, which appeared in the November, 1971, issue of Publishers Weekly and which I think would be informative. (See Appendix, p. 149.)

The CHAIRMAN. They will be received and inserted in the record.

Mr. FINKELSTEIN. May I have the resolution of the authors, CISAC, and the submission of the ASCAP supporting it? (See Appendix, p. 155.)

(Prepared statement of Mr. Finkelstein follows:)

STATEMENT OF HERMAN FINKELSTEIN SECTION OF INTERNATIONAL LAW AND CHARLES H. LIEB SECTION OF PATENT, TRADEMARK AND COPYRIGHT LAW ON BEHALF OF THE AMERICAN BAR ASSOCIATION

This is a joint statement by Herman Finkelstein and Charles H. Lieb on behalf of the American Bar Association in support of ratification of the Paris Revision of the Universal Copyright Convention.

Herman Finkelstein is a member of the New York and Connecticut bars residing in Hilltown Township, Bucks County, Pennsylvania. He is General Counsel of the American Society of Composers, Authors and Publishers (ASCAP), of One Lincoln Plaza, New York, N.Y. In that capacity, he was an adviser to the United States Delegation at the Paris Conferences in July 1971, which resulted in revision of the Universal Copyright Convention now before this Committee and the revision of the Berne Convention to which the United States is not a party, but which is very much involved in the revision of the Universal Copyright Convention as we shall point out. Mr. Finkelstein is Vice Chairman of the Committee on International Patent, Trademark and Copyright Relations of the Section of International Law and has been designated by that Section to make this statement.

Charles H. Lieb is a member of the New York and Connecticut bars. He is a member of the firm of Paskus, Gordon & Hyman, 733 Third Avenue, New York, N.Y.

He is Chairman of the Copyright Division of the Section of Patent, Trademark and Copyright Law and has been designated by that Section to make this statement. He resides in Easton, Connecticut.

This statement is submitted pursuant to the following resolution adopted by the American Bar Association on February 7 and 8, 1972, pursuant to the joint recommendation of the Section of International Law and the Section of Patent, Trademark and Copyright Law:

"Resolved, That the American Bar Association endorses the ratification by the United States of the Universal Copyright Convention as revised at Paris on July 24, 1971, and that the Section of International and Comparative Law and the Section of Patent, Trademark and Copyright Law are authorized to present the position of the Association in this matter before Congress."

We are concerned here with a revision of the Universal Copyright Convention (UCC) to which the United States has been a party since 1954. As will be shown, this Convention bears a relationship to another and older convention to which the United States has not thus far adhered, namely, the Berne Convention (Berne). Although the two conventions are independent of each other, when the UCC was formulated in 1952 it was agreed that it was not to be used to undermine Berne. In order to insure this, Article 17 of the UCC provided that the works of a country that has withdrawn from Berne will not be given protection under the UCC in other Berne countries. Thus a member of Berne may not leave that convention and rely upon the UCC to govern its international copyright relations. This is called the Berne Safeguard Clause and was adopted to insure the continuing high level as contrasted with the UCC which, until the Paris revision, had no minimum requirements except recognition of the right of translation and a relatively short term of copyright.

At the Stockholm Conference to revise the Berne Convention in 1967, the developing countries were successful in a drive to enable them, within the framework of Berne, to use copyrighted works originating primarily in the developed countrie without payment when such uses were for educational or cultural purposes. This modification of the Berne Convention has become known as the "Stockholm Protocol."[1] Much to the surprise of the proponents of the Protocol, the Stockholm revision of the Berne Convention was not ratified by the leading members of Berne whose works they intended to use, namely, France, Spain and the United Kingdom. The only developed country which had ratified Stockholm was Sweden (the host to the Stockholm Conference) whose works were of little interest to the developing countries.

[1] The implications and repercussions of the Stockholm Protocol and analyzed in Lazar, "Developing Countries and Authors' Rights in International Copyright," ASCAP Copyright Law Symposium No. 19 (1) (1971); Schrader, "Armageddon in International Copyright: Review of the Berne Convention, the Universal Copyright Convention, and the Present Crisis in International Copyright," (2) Advances in Librarianship 306 (1971); Ringer, "The Role of the United States in International Copyright," (56) Georgetown Law Journal 1050 (1968).

As a result of the failure of the Stockholm Protocol, the developing countries engaged in a move to revise the UCC in two respects: (1) by eliminating the Berne Safeguard Clause and (2) by transferring the Stockholm Protocol for all practical purposes from the Berne Convention to the UCC. If this move were successful, the developing countries would give up their membership in Berne and American works would in effect be subject to confiscation in the developing countries when used for educational or cultural purposes.

In order to find some method of satisfying the legitimate needs of developing countries and at the same time maintaining the integrity of the international copyright system, committees representing Berne and the UCC worked together with the very active cooperation of the United States to arrive at a basis for revising both conventions.

As a result, conferences were concluded in Paris on July 24, 1971, revising the UCC and Berne, and reaching an accommodation between the developed and developing countries. In addition, certain basic minimum rights were added to the UCC which originally provided only for the right of translation. The Paris Revision changes the UCC in the following respects:

1. The Berne Safeguard Clause is preserved for developed countries but developing countries may now withdraw from Berne without suffering any penalty.

2. The rights of reproduction, public performance and broadcasting are added to the right of translation as basic rights to be recognized in countries adhering to UCC. This will not require a change in our existing law. As the report accompanying the convention points out, "No country now meeting the obligations of the 1952 convention and according basic copyright protection would be required to assume new obligations in adhering to the 1971 convention" (Report, para. 44).

3. Certain exceptions to the right of translation are introduced in favor of developing countries. Compulsory licenses are permitted where a translation in the developing country's language is not available.

4. In addition to compulsory licenses for translations, developing countries are permitted to authorize the reproduction of works on a compulsory license basis if copies of a particular edition of a work have not been distributed in the country to the general public or in connection with systematic instructional activities. At least three years must elapse before such a license may be issued in the case of works in the natural and physical sciences; the period applied to works of fiction, poetry, drama, music and art books, however, is longer—seven years. For other works it is five years.

Turning to the Paris revision of Berne, although the United States is not a party to that Convention, the United States is directly involved because the Paris revision of Berne does not become operative unless the United States, France, Spain and the United Kingdom adhere to the Paris revision of the UCC. Consequently, if the United States does not adhere to the UCC Revision the latest Berne Revision will be the one signed at Stockholm in 1967 which includes the troublesome Protocol. If this happens the basic purpose of the Paris Revision of both conventions will have been defeated.

Although the United States is not a party to the Berne Convention our scientific, literary and musical works are protected throughout most foreign markets under that Convention. We are an exporting country in these fields and our works secure Berne protection by simultaneous publication in Canada or another Berne country. It is hoped that when our domestic law is revised we will be in a position to join the Berne Convention (with some slight modifications in that Convention) or that we may foster a merger of the two conventions. This will not be possible if the Stockholm Protocol remains a part of the Berne Convention because not only the United States but countries such as the United Kingdom, France and Spain, among others, will not adhere to the Stockholm revision of Berne so long as it contains the Protocol.

In the interest of advancing the cause of copyright throughout the world, the American Bar Association endorses ratification of the Paris revision of the UCC.

The CHAIRMAN. Thank you very much.

Mr. Kaminstein, I believe you have already submitted a statement to the committee. I am sorry that time has run out, but I have to go because I have to be prepared to vote on this upcoming resolution.

You are in support of this Convention, as I understand it?

STATEMENT OF ABRAHAM L. KAMINSTEIN, HONORARY CONSULTANT IN COPYRIGHT, LIBRARY OF CONGRESS

Mr. KAMINSTEIN. I am, but I would like to take up two questions that you raised: What are the disadvantages to the U.S. if we do not ratify? (1) The Countries in the Berne Union are likely to close the back door to the Berne Convention under which our publishers now are free to get protection under the Berne Convention. That has already been raised in Stockholm. (2) We would revert to the situation 20 years ago when the U.S. belonged to no international convention at all, when we had a series of 51 bilateral agreements under which in some cases you had to comply with the local law with the danger of losing all copyright protection. Furthermore, it took us 4 years to get this thing off the ground and we sweated night and day. If we don't ratify it, we will ruin our diplomatic standing in the copyright world, which is most important. And I see no reason, as you mentioned, why we should have two copyright conventions. It is time the United States amended the old copyright law and put us in the position of joining the Berne Convention. I would like to see all countries join in one convention. Thank you.

(Mr. Kaminstein's prepared statement follows:)

STATEMENT OF ABRAHAM L. KAMINSTEIN BEFORE THE SENATE COMMITTEE ON FOREIGN RELATIONS, AUGUST 2, 1972

UNIVERSAL COPYRIGHT CONVENTION, AS REVISED

My name is Abraham L. Kaminstein, and although I am an Honorary Consultant in Copyright at the Library of Congress, I must stress that today I represent only myself. It is a privilege for me to appear to urge ratification of the Universal Copyright Convention as Revised at Paris. Prior to my retirement on August 31, 1971, I spent 23 years in the Copyright Office, the last 11 years as Register of Copyright.

Following the adoption of the Stockholm Protocol to the Berne Convention, in 1967, international copyright entered a period of crisis. While the United States was not a member of the Berne Union, publishers in the United States for example, relied upon and used the "back door" to Berne protection by publishing simultaneously in Great Britain or Canada. The Protocol was a direct threat to the standards of protection and to the structure of international copyright which had evolved over the past one hundred years.

The reaction to the Protocol among authors, publishers, and other copyright owners in the United States, Britain, and elsewhere, was very strong. To attempt to revise the Protocol quickly seemed an impossible task, made even more so by the suspicion abroad that we were not really interested in raising the level of copyright protection, so long as we could use the "back door" of Berne. Placing any doubts to one side, and speaking for the United States delegation in Geneva in December 1967, I proposed a plan for revising the Protocol, and amending both Berne and the Universal Copyright Convention. The Universal Copyright Convention, of which the United States was one of the principal founders, had not been amended since 1952, when it was negotiated.

The plan was considered by the governing bodies of both conventions and approved. During the next three years, negotiations, meetings, and conferences took place. Ordinarily, it takes 20 years to revise an international instrument. Four years from the Stockholm Conference almost to the month, the Paris revisions of the Universal Copyright Convention and of Berne Convention were adopted.

In the United States the plan, initiated by the Copyright Office and approved by the State Department, won the approval of most of the copyright bar and the groups they represented. My colleagues at the State Department were very helpful: Bruce Ladd, Deputy Assistant Secretary, who took over just before the Conference in Paris from his predecessor, Gene Braderman, and especially Harvey

Winter, Director, Office of Business Protection, who was always there when we needed him. In the Copyright Office, we used three attorneys for research, as needed, and for two years before Paris we had the assistance of Bob Hadl. Barbara Ringer, Assistant Register of Copyright, conceived the entire plan, and with selfless dedication, directed, negotiated, drafted, and finally, produced a first draft of the comprehensive Report of the Paris Convention which has been made a part of Executive G.

Twenty years ago, our copyright relations with countries in Europe was a very intricate affair, a complex network of some 51 agreements, some requiring compliance with local law, which could result in loss of copyright—a kind of risky affair! Today, the United States is one of the major exporters of copyrightable material—our books, music, dramas, musicals, periodicals, motion pictures, TV go all over the world. We badly need the Universal Copyright Convention as revised in Paris. If we do not ratify the Paris revisions, it may be only a matter of time before states in Berne will close the "back door" and the entire fabric of international copyright could come apart.

The Paris revisions are not the complete answer to our problems, but they overcome the crisis of Stockholm, and pave the way for the future. To have two international conventions in any field is absurd and it is my hope that in the future all nations will be parties to one convention.

I strongly urge that the Committee on Foreign Relations approve the Universal Copyright Convention, as revised at Paris, and recommend that the Senate advise and consent to early ratification.

The CHAIRMAN. Thank you, Mr. Kaminstein.

The committee is adjourned.

(Whereupon, at 2:15 p.m., the committee adjourned, subject to the call of the Chair.)

APPENDIX

(Exhibits A through D submitted by Mrs. Bella Linden)

EXHIBIT A

LINDEN & DEUTSCH,
New York, N.Y.

UNIVERSAL COPYRIGHT REVISION TO BE SUBMITTED TO CONGRESS FOR RATIFICATION. BY ITS TERMS THE PROPOSED TREATY CALLS FOR PRIOR APPROVAL OF EXPROPRIATION OF WORKS CREATED BY UNITED STATES CITIZENS

A statement opposing ratification and alternatively, a proposal to mitigate the economic losses of American Authors and Publishers in the event of ratification of Paris text of U.C.C.

In July 1971 diplomatic conferences held at Paris proposed revisions to the Universal and Berne Copyright Conventions. These revisions were principally designed to reduce the costs to developing countries of using intellectual property created by authors and publishers in the developed countries. The Paris text of the Universal Copyright Convention will be submitted shortly to the United States Senate. Ratification of this treaty by the Senate would reduce the protection available to American authors and publishers under both the Berne and Universal Conventions, and would constitute formal approval by the Senate of the expropriation of the private property of American citizens without adequate compensation.

Despite the legitimate needs of underdeveloped countries for machinery, equipment and food, none of these goods and products are given to foreign countries by the United States simply by consenting in a treaty to the taking of these items without payment to the American owners of the property. It is not conceivable that intellectual property created and produced by American citizens would be treated by the Congress of the United States as less valuable. We urge therefore that the Senate not approve the Paris revision of the Universal Copyright Convention.

If, however, the Senate feels that the national interest of the United States in promoting the welfare of the developing countries requires ratification, the Federal Government should provide compensation to the authors and publishers adversely affected by such revision, following the precedent established in the Trade Expansion Act of 1962 and other legislation. After discussing the relevant provisions of the Paris Revisions, there is set forth the pertinent features and legislative history of the Trade Expansion Act.

1. SUMMARY OF THE MAJOR EFFECTS OF THE PARIS REVISIONS ON THE RIGHTS OF AUTHORS AND PUBLISHERS (IN PARTICULAR OF EDUCATIONAL MATERIALS)[1]

The Universal and Berne Copyright Conventions are the two treaties which provide international protection for the rights of authors, publishers and other copyright owners, in their books and other writings, their audio-visual works, and their other intellectual property in all media. The United States is a member of only the Universal Copyright Convention, and therefore only the revision of that treaty is formally before the Senate. However, American ratification of that revision will also render effective the Paris revisions of the Berne Convention.

Publishing and other means of dissemination of intellectual property are of multi-national scope today, and it is common for works to be published simultaneously in the United States and abroad. American authors and other creators of intellectual works thereby obtain the protection of the Berne Convention. Recognizing this fact, the Paris revision of the Berne Convention provides that

[1] A more detailed statement of the provisions of the Paris revisions is attached as Annex A, together with columnar comparisons with the existing Berne Conventions and the Stockholm Protocol.

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it will not go into effect unless and until the United States, the United Kingdom, France and Spain ratify the Paris revision of the Universal Copyright Convention.

This provision also explains why the Paris sessions which produced the revisions of both treaties were conducted concurrently and the substantive provisions of the revisions of both texts are almost identical, insofar as they concern developing countries. Thus, the United States' decision upon ratification of the Paris revision of the Universal Copyright Convention is inextricably intertwined with the same revision of the Berne Convention, and the effects of both treaties must be considered together.

The foreign market and the involvement therein of American educational publishers has increased markedly during the last decade and there is every evidence that the American publishing industry is not only exporting more works but is investing in foreign publishing. While the concessions of the Paris revision run in favor only of "developing countries", that term is so undefined as to allow over 80 countries, including some in Europe, to qualify. Virtually every country outside North America and Europe, save only Australia, New Zealand, and Japan, could be considered "developing".

The concessions granted to the "developing countries" primarily deal with the rights to translate and reproduce for educational purposes. But the scope of such purposes, as is shown below, is so broad that far more than textbooks, reference works and the usual instructional audio-visual materials may be covered; the term may be deemed to include, in practice, virtually any work so long as its use is in any way related to any form of instruction, scholarship, or research. For the authors and publishers of educational materials, the "educational" exemptions eliminate over 80 countries from their market.

A. The Compulsory translation and reproduction licenses

The most important provisions of the Paris revisions allow developing countries to grant licenses without permission of the copyright owners for the translation and reproduction of works within a short time after their publication. The revisions state that the copyright owners shall be paid a "just compensation consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned," but this is likely to prove an empty formula.

Under the terms of the Paris revisions, and by the very nature of such licenses, they are likely to be granted only after the copyright owners have already rejected as inadequate the royalties and other licensing terms proposed by the users in the developing country; the new terms are likely to be even more exiguous. Furthermore, by the very nature of the class of developing countries, there will likely not be sufficient bilateral relations to establish royalty standards with any definiteness, and particularly not for the newer forms of educational materials, especially audio-visual works. The "consistency" to be expected under the Paris standard will therefore be far below the reasonable minimal expectations of authors and publishers. Moreover, the standard will be policed only by the national tribunals of the respective developing countries. In sum, adequacy of compensation appears to be left, in actuality, to the developing country's own judgment as to what amount is "just".

The compulsory translation license applies to translations into any language "in general use" in a developing country. It may be granted within a short period after first publication of the original work, if a translation into the national language has not been published or is out of print. For translations into a language not in general use in any developed country which is a member of the particular Convention, the period is one year. If the language is in general use in such a developed country, the relevant period is three years; but for languages other than English, French and Spanish, the period can be reduced by agreement with the developed country where the language is in general use (e.g., Brazil and Portugal agreeing to reduce the period for Portuguese one year). Under the existing Berne Conventions, any country may reserve the right to make translations into its national languages without compensation, but only beginning ten years after publication and only if no such translation has been published in any member of the Convention. Under the existing Universal Copyright Convention, a member country can grant compulsory licenses for translation into its national languages beginning seven years after publication of the original work, if the work has not been translated into such languages or if the translations are out of print.

The compulsory reproduction license of the Paris revisions becomes available a stated number of years after the first publication of a work, as described below, if copies have not been distributed or have not been on sale for six months in the

licensing State "at a price reasonably related to that normally charged in that State for comparable works." Where the publication of such works is subsidized in any way by a developing State, it will, of course, be impossible for American publishers to make copies of their own works available at such prices. The stated periods are three years for works of science, mathematics and technology; seven years for works of fiction, poetry, drama and music; and five years for other works.

It has frequently been asserted that compulsory licensing under the Paris revisions will be the exception rather than the rule. The hard fight waged by the developing countries to obtain the compulsory licensing system, however, indicates that they themselves expect to make substantial use of the system. The effect will be both to deprive American authors of compensation and to exclude American publishers from serving developing countries by any means, including direct sales or by foreign publishing affiliates.

B. The vague definition of "developing countries"

The Paris revisions, as we have noted above, contain no objective criteria of what constitutes a "developing country", nor are there any viable standards relating the class of countries entitled to invoke the special concessions to the ends sought to be served by the concessions. A developing country is defined simply as one which is "regarded as a developing country in conformity with the established practice" of the General Assembly of the United Nations. Although the reference to the "established practice" of the United Nations may be considered to mandate some reference to its practice in the selection of countries entitled to reduced levels of contributions to U.N. upkeep (based principally on per capital income statistics) or in granting economic assistance, it is generally understood that these "standards" fluctuate widely and may turn upon factors—political, historical or even economic—having little relevance to the legitimate need of any country for the reservations established by the Paris revisions. There is no central arbiter nor list of "developing countries" and, in the final analysis, it seems clear that each country adhering to the revised Convention is able to determine for itself whether it may invoke the compulsory licensing provisions. It is clear, further, that a great many countries in South and Central America, Asia, Africa, the Middle East and even parts of Europe will be able to claim the benefits of these provisions with sufficient credibility under the Convention standard to avoid the appearance of an outright rejection of its Convention obligations.

It is not without significance that those countries seeking special concessions at the Paris conferences steadfastly refused to admit any objective criteria of the status of a country's development for the purposes of the revisions, and that the opinion of the General Rapporteur of the U.C.C. "Concerning the Criteria Governing 'Developing Countries'" is contained in a document which states the opinion to be "purely personal . . . [and] although . . . based in part on the discussion of the question during the Paris Conference, [one which] cannot in any way be regarded as reflecting the views of other delegates or as constituting a part of the General Report of the Conference."

The inadequacy of the definition of a "developing country" as expressed in the Paris revisions is apparent not only at the stage at which a country may invoke the special reservations on the rights of translation or reproduction, but also at the stage at which it may no longer do so—i.e., when it "ceases to be regarded" as a developing country. The inadequacy of the notion of a "developing country" in the Paris revisions not only allows an enormous number of countries at various stages of development to grant compulsory licenses, but also allows them to continue doing so as their states of development improve, virtually without limit. The only cutoff point stated in the Paris revisions is the point at which a country "ceases to be regarded" as a developing country, a phrase for which there are no more objective criteria than there are for the definition of "developing countries" discussed above. Thus, any country initially taking the benefit of the compulsory licenses may well continue to grant such licenses after having achieved a stage of development sufficient to enable it to deal with the property of others on a level expected of other Convention countries.

C. The "educational" limitation

The compulsory license provisions available to developing countries under the Paris revisions are, as has been repeatedly pointed out by proponents of ratification, circumscribed by reference to "educational" limitations on the scope of the license. Thus, compulsory translation licenses may only be granted for the purposes of "teaching, scholarship or research," while compulsory reproduction licenses (and

translation licenses for non-broadcast use of audio-visual text) are limited to use in connection with "systematic instructional activities." In some cases, such limitations serve also to describe the class of works subject to compulsory licensing—thus, only audio-visual works "prepared and published for the sole purpose of being used in connection with systematic instructional activities" are subject to such licenses. In a similar vein, both broadcasts utilizing compulsory licensed translations and the permitted export of such translations under certain conditions are to be devoid of commercial purpose.

For authors and publishers of educational materials, since it is addressed to eliminate their entire market, such limitations obviously provide no comfort, and their significance is a negative one. They only serve to underscore a basic point of these comments—that a particular segment of American enterprise is being asked (required might be a better word) to devote the product of its private initiative to the subsidization of the development of foreign countries in a manner thoroughly inconsistent with our traditional concepts of property and of individual vs. governmental responsibility.

Assuming that some American authors and publishers do find initial comfort in the educational limitations on compulsory licensing under the Paris text, either as a device for insulating them from the effect of such licensing or as a theoretically satisfactory justification for the need for such reservation, they would do well to consider how little actual limitation these standards impose. The Report of the General Rapporteur for the Paris U.C.C. Conference notes the "understanding" that "scholarship" encompasses not only instruction at grade and high schools, colleges and universities, but also a "wide range of organized educational activities intended for participation at any age level and devoted to the study of any subject" and that "systematic instructional activities" include "not only activities connected with the formal and informal curriculum of an educational institution, but also systematic out-of-school education." The Report also notes that the possibility of the general public sale of copies produced under compulsory licensing was "envisaged" at the Conference. The only palliative offered for this possibility is that the licensing authority of the State would be "under a duty to determine that the License would fulfill the need of specified 'systematic instructional activities' [and the license] would necessarily be refused if such activities were in fact incidental to the actual purpose of the reproduction." Observers at the Paris Conference were left with but little doubt that, as we have indicated above, the countries seeking the benefit of these reservations have a rather fluid and wide-ranging conception of "scholarship", "education", and the other "limitative" criteria.

D. Reproduction under compulsory licenses outside the developing countries

The Paris revisions provide that compulsory licenses are "valid only for publication" in the territory of the licensing State, but the discussions at the Paris conference made abundantly clear, as confirmed by governing interpretations in the Report of the General Rapporteurs, that works may be printed outside a developing country pursuant to its compulsory license, and joint translation facilities may be employed by several countries under their compulsory licenses. This interpretation imposes only the following restrictions of substance on foreign reproduction of compulsory licensed works:

1. The reproduction facilities in the developing country are "incapable for economic or practical reasons" of reproducing the copies (a standard to be interpreted by the developing country itself);
2. The country of reproduction is a Berne or U.C.C. member;
3. All copies reproduced abroad are delivered to the licensee in bulk for distribution only in the developing country;
4. The reproduction facility is not "specially created" for reproduction under compulsory licenses. The interpretation also provides that compulsory licensees may employ translators and editorial personnel in other countries, and that several compulsory licensees from different countries may use the same translation; and
5. The reproducing facility guarantees that the work of reproduction is lawful in its own country.

To illustrate the result—half a dozen or more developing countries may utilize the same editorial, translation and printing facilities, located in any Berne or U.C.C. country, to translate and/or reproduce a work to be used pursuant to the compulsory license provisions of each country. These joint printing facilities need not even be in a developing country. Given the additional right of a joint translation, this in fact results in a publishing enterprise servicing a group of developing countries.

There is furthermore no requirement that these foreign translation, editorial, and printing operations must not be conducted for profit. In other words, these may well be profit-making publishing enterprises. The compulsory licenses will save them most of the initial costs and royalty expenses, which are among the heaviest expenses of any publishing enterprise. The net result will be to sanction profit-making publishing operations which will preempt markets from the authors and publishers of copyrighted materials.

The foregoing is a brief summary of the provisions of most interest to educational authors and publishers. Attached as Annex A is a chart that summarizes in parallel columns the major substantive provisions dealing with translation, reproduction and other rights under the existing Berne Convention and the Stockholm Protocol and the Paris revision of that Convention.

Since the concessions to developing countries under the Paris revisions of the Universal and Berne Conventions are substantially the same, a general summary of the concessions made by the Paris revision of the Universal Convention is reflected in the columnar presentation of the Paris revisions to the Berne Conventions. Such significant differences as exist are set forth in footnotes to the chart.

The view has been expressed that the Paris revision of the Berne Convention is a substantial improvement over the Stockholm Protocol to that Convention. The Stockholm Protocol, which only five years ago created such a furor, has not been adopted by the developed countries, because of its broad preemption of the rights of authors and publishers. For authors and publishers of educational materials, however broad or narrow that category may be, examination of the chart attached as Annex A will show that the Paris revision can hardly be deemed a meaningful improvement for them over the Stockholm Protocol. The changes in the compulsory license scheme have been largely procedural, and promise no substantive relief of any importance. Regardless of the more circuitous formalities required, the result for educational authors and publishers would be the same—expropriation.

II. THE PROPRIETY OF AND PRECEDENT FOR GOVERNMENTAL COMPENSATION IF THE PARIS REVISION IS RATIFIED

For the reasons above, we urge that the Paris Revision of the Universal Copyright Convention should not be ratified. However, if the Senate deems that the underlying national interests of the United States require such ratification, notwithstanding the injury to some of its citizens, we suggest that provision be made for governmental compensation to those authors and publishers whose interests would be sacrificed.

United States economic assistance to developing countries has always heretofore been a governmental responsibility, discharged by money payments or loans to developing countries or by governmental purchases of needed materials which were then supplied directly to the foreign countries. If in this case the United States Government feels it cannot take that course with respect to intellectual property, and that economic assistance with respect to such property must become an individual responsibility of a class of American citizens, then governmental action to compensate American authors and publishers for this burden is appropriate. The Senate, and the United States Government in general, has a history of carefully guarding the rights of United States citizens where the national interest requires that some private interests of some citizens be sacrificed in order to make concessions to foreign countries. The outstanding example is the adjustment assistance provisions of the Trade Expansion Act of 1962.

The Trade Expansion Act liberalized United States tariff provisions so as to make possible what later became known as the Kennedy Round of tariff reductions. When the Act was proposed and enacted, it was recognized by all concerned that some firms and workers would be seriously injured by the increase in imports which the contemplated tariff reductions would allow. Accordingly, the Act included provisions under which injured firms could receive assistance consisting of technical assistance, government loan guarantees, and tax assistance, and affected workers could receive assistance consisting of a form of unemployment compensation, training for other jobs, and relocation allowances. These forms of assistance are paid by the Federal Government and at levels which are uniform throughout the nation.

The legislative history of the Act makes clear that these provisions embody a broad general principle. The initial form of the Act was drafted by the Kennedy Administration and introduced in the House as H.R. 9900 of the 87th Congress. The President's message, dated January 25, 1962, accompanying the bill stated in part:

"When considerations of national policy make it desirable to avoid higher tariffs, those injured by that competition should not be required to bear the full brunt of the impact. Rather, the burden of economic adjustment should be borne in part by the Federal Government.

* * * * *

"Just as the Federal Government has assisted in personal readjustments made necessary by military service, just as the Federal Government met its obligation to assist industry in adjusting to war production and again to return to peacetime production, so there is an obligation to render assistance to those who suffer as a result of national trade policy." (H. Doc. #314, 87th Cong. 2d Sess., reprinted in H.R. Ways and Means Comm., 90th Cong., 1st Sess., "Legislative History of H.R. 11970, 87th Cong., Trade Expansion Act of 1962" (1967), at pp. 90–91 (hereinafter cited as "Leg. Hist.").)

Secretary of Commerce Luther Hodges made the principal presentation before the House Ways and Means Committee. Discussing relief for firms and workers injured by increased imports, he said:

"The Federal Government has a special responsibility to such firms and workers. For their hardship can be directly traced to a specific action undertaken by the Government for the good of all—the lowering of trade restrictions in order to open up new markets for our goods abroad. As the President has said, no industry or work force should be made a sacrificial victim for the benefit of the national welfare. No small group of firms and workers should be made to bear the full burden of the costs of a program whose great benefits enrich the Nation as a whole." (H.R. Ways and Means Committee, 87th Cong. 2d Sess., Hearings on H.R. 9900, p. 90; Leg. Hist. p. 172.)

The Ways and Means Committee revised the administration's bill and reported out the revision as H.R. 11970. In its report, the Committee justified the adjustment assistance provisions in the following language:

"The furnishing of this assistance is fully consistent with our traditional practice of protecting American commerce and labor from serious injury resulting from imports. It will enable those firms and workers injured by increased imports to receive prompt help that is suited to their individual needs." (H. Rept. No. 1818, 87th Cong., 2d Sess., pp. 13–14; Leg. Hist., pp. 1077–78)

Representative Hale Boggs was the floor manager of the bill in the House. In his speech introducing the bill, he supported the adjustment assistance provision as follows:

"[I]t is based on a very sound fundamental principle: That in the pursuit of a national objective, we shall give assistance to the businessman who is hurt and give assistance to the workingman who is hurt. There is nothing new or radical about this. When we call a lad and say: You must go to serve your country in the Army or the Navy or the Air Force, we also say to him: Son, when you come back home, your job will be waiting for you. We assure him of reemployment rights. If he is hurt, we put him in a veterans' hospital.

"Throughout the entire history of the United States, we have consistently recognized the fact that in the pursuit of an overall national policy, we have made adjustments for those who are injured thereby—whether it be injury to firms or to workers. That is all this bill does—nothing else. In most instances, it will use existing machinery which has already been established by law." (Cong. Rec. 6/27/62, pp. 11,086–87; Leg. Hist. p. 1189.)

Representative Keogh, another member of the Ways and Means Committee, subsequently remarked about these provisions:

"Having set up the fences which we now propose to lower or remove, we have the obligation—in equity and good conscience—to assist these affected firms and workers in meeting the new situation which the Government will permit to come about." (Cong. Rec. 6/27/62, p. 11,111, Leg. Hist. p. 1233.)

Both in the House and in the Senate, objections were raised to the payment of a uniform amount to workers, rather than the amounts payable under state unemployment compensation systems, which in most cases were much less. In the House, representative Conte of Massachusetts argued that this was discriminatory and offered as a particular example unemployment in his home district caused by cancellation of a government contract. Representative Mills, then as now Chairman of the Ways and Means Committee, answered that in Conte's example the government was acting like any other contractor, and continued:

"Assistance in the case of removal of tariffs can be justified, because this condition arises through Government sovereign action, taken in the public interest, to lower tariffs and thereby take a job away from this man. The sovereign

has seen fit to remove a tariff which it placed on an article to protect the job. In all equity and good conscience it must take steps to make the affected worker's adjustment to the new competitive conditions created by its own acts as easy as possible under the circumstances." (Cong. Rec. 6/27/62, p. 11,117; Leg. Hist. pp. 1243–44.)

In the Senate, two amendments were offered with respect to the adjustment assistance provisions. The first sought to eliminate the provisions entirely. The asserted grounds were that the provisions discriminated against those unemployed for other reasons, that some of these others might have become unemployed because they had been providing goods and services to the industries forced out of business by imports, and that there was no essential difference between unemployment caused by imports and unemployment due to changes in government purchasing. (Remarks of Senator Curtis, Cong. Rec. 9/17/72, p. 18,688; Leg. Hist. pp. 1702–03.) (Of course, the motive for the amendment was to eliminate labor support of the Act as a whole and thereby defeat the Act.)

Senator Williams of New Jersey opposed the amendment and defended the provisions in the bill as follows:

"I strongly support the President's trade program. I think it is vital to our Nation's continued growth and prosperity. But I see no reason why the few communities, industries or workers who may possibly suffer some adverse effect from the reduction of trade barriers must bear the entire burden. If the interests of the Nation and the interests of our national trade policy cause some injury, the Nation, and therefore the Federal Government have a clear and unmistakable obligation to alleviate that injury and facilitate adjustment to new economic activities." (Cong. Rec. 9/17/72, p. 18,691; Leg. Hist. p. 1706.) The first amendment was defeated, 58–23.

The second amendment was offered by Senator Byrd of Virginia. It would have set the level of payments at the rate prevailing under state unemployment compensation programs, rather than at the uniform national level set by the bill. The arguments in support of the amendment were similar to those for the previous amendment. In opposition to the amendment and in support of the pending bill were the following remarks:

Senator Smathers: "I, too, believe in States rights. I believe that if an injury done to a worker results from action taken by a State, the State, rather than the Federal Government, should provide the proper compensation.

But when this bill goes into effect, the injury will result from Federal action, from the action of the Federal Government in removing the tariff, thereby allowing the entrance of imports which will result in damage to an industry and in the loss of the jobs of the workers in that industry. In view of the fact that the action would be Federal action, those of us on the committee took the position that the Federal Government should have the responsibility for making the compensation payments due to the worker because he lost his job as a result of action taken by the Federal Government.

I believe that in this instance the Federal Government, acting in what I regard as the overall interest of the Nation—and I recognize that some workers will be injured thereby, but there will be overall benefit to American industry and to the general economy—has the responsibility, under the original concept, to provide funds for proper and necessary compensation." (Cong. Rec. 9/17/72, p. 18,692; Leg. Hist. p. 1712.)

Senator Long: "Mr. President, it is a fair proposal that Federal standards be used in paying for Federal injury, we provide private relief bills to compensate Federal injury all the time. If one examines the calendar, he will find more private relief bills than any other kind. This is a relief bill for those the Federal Government chooses to injure in the pursuance of a program in the overall national interest. On the whole, we anticipate an increase in national income as a result of the bill. We anticipate an increase in employment overall. We do not want to do that at the expense of a few and the suffering of an unfairness to a few Americans who will be injured." (Cong. Rec. 9/17/72, p. 18,695; Leg. Hist. p. 1714.)

Senator Mansfield: "These import-affected workers would not be casualties of supply and demand or any other impersonal economic force. Instead, their unemployment would be directly attributable to a decision of the Federal Government taken in the national interest. Certainly, the Federal Government would owe a special obligation to those injured by such actions."

The amendment was defeated, 51–31. The principle was thereby affirmed that if the Federal Government causes injury to some industry in order to achieve some broad goal of foreign policy, it should compensate those who have been injured, at least in part.

Accordingly, it is urged that the precedent of the Trade Expansion Act be followed and that an appropriate enactment be promulgated to vitiate the economic damage upon authors and publishers if Congress should determine that it is in the national best interest to ratify the Paris text of the Universal Copyright Convention. If, as supporters of the Paris revisions have asserted, the compulsory licensing provisions will be little used by the developing countries, then the Senate will have affirmed, at little cost, the sound principle that a small class of citizens is not to be required to bear the burden of furthering the national interests without compensation. If, as we fear, compulsory licensing will become widespread among developing countries, then the injury to authors and publishers will be substantial in terms of the formal dimensions of the publishing industry, and there will be a serious need for compensation. Measured against the sums which the Congress usually appropriates in connection with foreign aid, however, the amount of compensation would in any event be negligible.

We suggest that provisions for such compensation would be simpler than those of the Trade Expansion Act because:

(1.) The Paris texts of both the U.C.C and the Berne Union include procedures for notifications to the copyright owners or proprietors when a developing country grants a compulsory license on copyrights owned by United States citizens (as well as all other countries).

(2.) Under the Adjustment Assistance program of the Trade Expansion Act, one recurring problem which requires extensive investigations by the Tariff Commission is to determine whether injuries to particular American industries are caused by current tariff reductions or other factors, such as general business conditions, increasing American costs, prior tariff reductions, etc. Such problems are entirely absent here, where the loss of income to authors and publishers is demonstrated from the use of their literary property by a developing country (with little compensation or none) under compulsory licenses.

(3.) The uses made of educational materials in the developing countries can be measured. Royalties under compulsory licenses, regardless of their rates, will normally be measured by such uses, i.e., number of books, records, tapes, etc. sold, and such numbers should in the ordinary course be reported together with the royalty payments, or be obtained by inquiry from the licensees.

(4.) The measure of compensation that could be set forth in the statute would be a predetermined percentage of those royalties which publishers and authors charge in the normal course of export licenses.

Accordingly it is urged that the Paris Revision of the Universal Copyright Convention not be ratified. However, in the event that despite the unwarranted and unfair distinction made between tangible property and intellectual property Congress decides that it is in the national interest to ratify the treaty, then it is urged that an enactment paralleling the Adjustment Assistance provisions of the Trade Expansion Act be passed to preserve the rights of authors and publishers in conformity with the traditions of the United States.

B. L. LINDEN.

COMPARISON OF CONCESSIONS TO DEVELOPING COUNTRIES UNDER THE EXISTING BERNE CONVENTIONS, THE STOCKHOLM PROTOCOL AND THE PARIS REVISION [1]

ANNEX A

Chart I.—Translation Rights

[1] The following tabular summary of the "Paris Revision" relates to the Paris Revision of the Berne Convention. Substantial differences between this Revision and the Paris Revision of the Universal Copyright Convention are indicated by asterisks and explained by "Notes" appearings at the conclusion of the tables. Where no "Note" is indicated, the summary of the "Paris Revision" serves as a summary of the concessions made to developing countries in the Universal Copyright Convention.

EXISTING BERNE CONVENTIONS (ROME, 1928 AND BRUSSELS, 1948)	STOCKHOLM PROTOCOL (1967)	BERNE PARIS REVISION (1971)
No Concessions: Despite Convention recognition of exclusive translation rights, any country may reserve the right to allow translation of Works into its national languages without authorization or compensation if, after ten years from first publication of the original Work, an authorized translation into such language has not been published in a Union country. Other Convention countries may not retaliate against Works emanating from a country making this reservation. [Art. 25(3)] No Compulsory License.	A developing country may reserve the right to allow translation of Works without authorization or compensation if, after ten years from first publication of the original Work, an authorized translation has not been published in a Union country in the language for which protection is claimed. Developed countries may not retaliate against Works emanating from a developing country making this reservation. [Protocol, Art. I(b)(i)] (A developed country making such a reservation under Stockholm is subject to retaliation [Text, Art. 30(2)(b)]). *In addition to* allowing free translation ten years after first publication, a developing country may subject the right of translation to compulsory licensing. [Protocol, Art. I(b)(i)(ii)] The system of compulsory licensing allows the "competent authority" (not defined) of a developing country to authorize the translation of Works, and the publica-	Same as Stockholm Protocol with respect to translation into languages "in general use" in the developing country. [Appendix, Arts. V(1)(a), I(6)(b); Text, Art. 30(2)] [2] [2] See Note (1). *As an alternative* to allowing free translation ten years after first publication, a developing country may subject the right of translation to compulsory licensing [Appendix, Art. II, V(1)(c), V(2), I(1)].[2] The system of compulsory licensing allows the "competent authority" (not defined) to authorize the translation of Works, and the publication of the transla-

EXISTING BERNE CONVENTIONS (ROME, 1928 AND BRUSSELS, 1948)	STOCKHOLM PROTOCOL (1967)	BERNE PARIS REVISION (1971)
	tion of the translation, without the authority of the owner of translation rights, on certain terms and conditions. [Protocol, Art. I(b)(ii)]	tion in printed or analagous forms of reproduction, without the authority of the owner of translation rights, on certain terms and conditions. [Appendix, Art. II(1), II(2)(A)]. In the case of certain audio-visual Works, the license extends to publication of the translation in audio-visual form. [Appendix, Art. III(7)(6)].
	All books, audio-visual Works, and other Works are subject to compulsory translation license. [Protocol Art. I(b); Text, Art. II]. No special provision is made concerning application of the compulsory license to the textual portions of audio-visual Works.	All Works "published in printed or analogous forms of reproduction" are subject to compulsory translation licensing. [Appendix, Art. II(1)] The textual portions of audio-visual Works which were "prepared and published for the sole purpose of being used in connection with systematic instructional activities" are subject to a compulsory translation license. [Appendix, Art. II(9)(c), III(7)(b)]. (The rules governing translation of the textual portions of audio-visual Works differ from those governing printed Works. In the former case, the rules follow those pertaining to the compulsory reproduction license under the Paris Revision.)
	A compulsory translation license may be granted without restriction as to purpose.	*Printed Works:* A compulsory license for translation of printed Works may be granted only for the purpose of "teaching, scholarship or research." (Appendix, Art. II(5)) A broadcasting organization headquartered in a developing country may secure a compulsory license to translate a printed Work if the translation is only for use in

broadcasts (live or recorded) to recipients within the developing country, which broadcasts are intended exclusively for "teaching or the dissemination of the results of specialized technical or scientific research to experts in a particular profession"; and if "all uses made of the translation are without any commercial purpose." [Appendix, Art. II(9)(a)(b)]

(The compulsory translation license does not encompass the right to record or broadcast the translation. However, Convention recognition of the broadcasting right allows member countries to determine the conditions under which that right may exist, subject to compensation which may be fixed by the competent authority, and to "determine the regulations for ephemeral recordings" made by broadcast organizations. Text, Art. II *bis*.)

Audio-Visual Works (Prepared and Published Solely For Use in Connection with Systematic Instruction): Broadcasters may secure a compulsory license to translate the textual portions of such Works for the same purposes as noted in connection with their translation of printed Works. [Appendix, Art. II(9)(c)]

In other cases, a compulsory license for translation of the textual portions of such Works may be granted only for "use in connection with systematic instructional activities" [Appendix, Art. III(7)(b), III(1)]

The compulsory translation license may only be granted for translation into a language "in general use" in the licensing State. [Appendix, Art. II(2)(a), III(7)(b)]

The compulsory translation license may only be granted for translation into a "national, official, or regional language" of the licensing State. [Protocol, Art. I(b)(iii)]

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EXISTING BERNE CONVENTIONS (ROME, 1928 AND BRUSSELS, 1948)	STOCKHOLM PROTOCOL (1967)	BERNE PARIS REVISION (1971)
	The compulsory translation license becomes available *three years* after first publication of the original work if a translation thereof has not then been published *in the licensing State* into a national, official or regional language of that State, *or* if all previous editions of a translation in such language in that State are then out of print. (The license will be available for translation into any of the national, official or regional languages into which the original work had not been published or in which a translation is out of print.) [Protocol, Art. I(b)(ii)].	*Printed Works:* The compulsory translation license becomes available after a stated number of years from first publication of the original Work *if* a translation thereof has not then been published *anywhere* in the language concerned, *or* if all editions of a translation into such language are out of print. In the case of translations into a language not in general use in any developed Berne country the relevant period is one year. [Appendix, Art. II(3)(a), II(2)(a)] In the case of translations into a language *in general use* in any developed Berne country, the relevant period is three years. [Appendix, Art. II(2)(a)] (In the case of translations into languages other than English, French or Spanish, a lesser period may be substituted by agreement between the developing country and all developed Berne countries in which the language is in general use. Appendix, Art. II(3)(b)). *Audio-Visual Works* (Prepared and Published Solely For Use in Connection With Systematic Instruction): The compulsory translation license becomes available to broadcasters at the same times as govern printed Works. [Appendix, Art. II(9)(c)(d)] In other cases, a compulsory license for translation of the textual portions of such Works becomes available (in connection with a compulsory license to reproduce the

Work) after a stated number of years from first publication of the Work *if* copies thereof have not then been distributed in the licensing State "at a price reasonably related to that normally charged in [that] country for comparable works," *or* no copies have been on sale for six months in that State at "reasonably related" prices. [Appendix, Art. III(7)(b), III(2)(a)(b)]

The relevant period is: three years for Works in the area of science, mathematics and technology; seven years for Works of fiction, poetry, drama and music; five years in other cases. [Appendix, Art. III (7)(b), III(3)]

An applicant for a compulsory translation license must, "in accordance with the procedure" of the licensing State, establish either:

(1) "That he has requested, and been denied, authorization" by the owner of the translation right [Appendix, Art. IV (1)]. In this case:

—At the time of making his request, the applicant "shall inform" an information center designated by the publisher's country. [Appendix, Art. IV(1)]; and

—The license may not be granted until after the expiration of varying monthly grace periods from the applicant's compliance with the foregoing. If, during these grace periods, the owner publishes a translation anywhere into the relevant language (or, in the case of audio-visual works, causes their distribution at "reasonably related" prices in the licensing State), the license may not be granted. [Appendix, Art. II(4)(a)(i), II(4)(b), III(7)(b), III(4)(a)(i), III(4)(c)]

An applicant for a compulsory translation license must, "in accordance with the procedure" of the licensing State, establish either:

(1) "That he has requested, and been denied, authorization" by the owner of the translation right [Protocol, Art. I(b)(ii)];

EXISTING BERNE CONVENTIONS (ROME, 1928 AND BRUSSELS, 1948)	STOCKHOLM PROTOCOL (1967)	BERNE PARIS REVISION (1971)
	or	*or*
	(2) "That, after due diligence on his part, he was unable to find the owner of the right." [Protocol, Art. I(b)(ii). In this case:	(2) "That, after due diligence on his part, he was unable to find the owner of the right." [Appendix, Art. IV(1)]. In this case:
	—The applicant must send copies of his application to the publisher of the Work and a representative of the country of the owner [Protocol, Art. I(b)(iii)]; and	—The applicant must send copies of his application by registered airmail to the publisher of the Work and an information center designated by the publisher's country [Appendix, Art. IV(2)]; and
	—The license may not be granted until after the expiration of two months from the dispatch of copies of the application [Protocol, Art. I(b)(iii)]	—The license may not be granted until after the expiration of varying grace periods from the dispatch of copies of the application. If, during these grace periods, the owner publishes a translation anywhere into the relevant language (or, in the case of audio-visual Works, causes their distribution at "reasonably related" prices in the licensing State), the license may not be granted. [Appendix, Art. II(4)(a)(2), II(4)(b), III(7)(6), III(4)(a)(ii), III(4)(b), III(4)(c)]
	Developing countries establishing a system of compulsory translation licenses must make "due provision" to assure:	Developing countries establishing a system of compulsory translation licenses must make "due provision" to assure:
	(1) a "correct translation" [Protocol, Art. I(b)(iv)]; and	(1) a "correct translation" [Appendix, Art. IV(6)(b)]; and
	(2) a "just compensation" [*Id.*]	(2) a "just compensation that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned." [Appendix, Art. IV(6)(a)(i)]
	Payment and transmittal of compensation is "subject to national currency regulations." [Protocol, Art. I(b)(iv)]	If national currency regulations hinder payment and transmittal of compensation, the "competent authority" shall use "all

The obligation to pay compensation under a compulsory translation license terminates after ten years from first publication of the original work, if an authorized translation has not yet been published into the language in question in a Berne country. [Protocol, Art. I(b)(viii)]

A compulsory translation license is generally "valid only for publication in the territory of" the licensing State. [Protocol, Art. I(b)(v)]

However, copies may be imported and sold in other countries allowing such importation and sale. [Protocol, Art. I(b)(v) (effect of next-to-final sentence as negating conditions of prior sentence)]

efforts" to ensure transmittal in internationally convertible currency. [Appendix, Art. IV(6)(a)(ii)]

A compulsory translation license generally "does not extend to the export of copies" and is "valid only for publication" in the territory of the licensing State. [Appendix, Art. IV(4)(a)] [Copies published under a compulsory translation must bear a notice that the copies are available only for distribution in the licensing State. Appendix, Art. IV(5)] (But the opportunity to engage in joint translation and reproduction abroad substantially equals the consequences of permitted export. See Chart I pg. 8)

However, in the case of translations into languages other than English, French or Spanish a public entity of the licensing State may export copies made under a compulsory translation license to its nationals in other countries, *provided* the copies are used "only for the purpose of teaching, scholarship or research", the export and distribution of the copies is "without commercial purpose", and the receiving country has agreed to the importation. [Appendix, Art. IV(4)(c)].

This permissible export is not applicable to audio-visual works. [See, Appendix, Art. IV(4)(c) and Art. III(7)(b)]

EXISTING BERNE CONVENTIONS (ROME, 1928 AND BRUSSELS, 1948)	STOCKHOLM PROTOCOL (1967)	BERNE PARIS REVISION (1971)
	Copies made under a compulsory translation license may be reproduced outside of the territory of the licensing State. [See Report, Main Committee II (Stockholm) par. 14]	Copies made under a compulsory translation license may be reproduced in printed form outside of the territory of the licensing State if the licensing State has no reproduction facilities (or its facilities are "incapable" of reproducing the copies), all copies are returned in bulk to the licensing State, and the reproducer guarantees that the work of reproduction is lawful in its country. [General Report on the Paris Conference (Berne) par. 40] Such reproduction may only take place in a Berne or Universal Copyright Convention country, and may not be done by a reproduction facility "specifically created" for compulsory licensing purposes. [*Id.*] The incorporation of compulsory-translated audio-visual texts into audio-visual Works may be done outside the territory of the licensing State under the same conditions. [*Id.* at par. 41(a)]
	Compulsory translation licenses terminate if an authorized translation into the language in question is published in the licensing State within ten years from first publication of the underlying Work. [Protocol, Art. I(b) (vii)] Copies made before termination may continue to be sold. [*Id.*]	Compulsory licensees may employ translators and persons doing preliminary editorial work in other countries. [General Report par. 42]. A number of compulsory licensees may use the same unpublished translation [*Id.*]. Compulsory translation licenses terminate if an authorized translation into the language in question is published at a price reasonably related to that normally charged in the licensing State for comparable Works. [Appendix, Art. II(6)] Copies made before termination may continue to be distributed "until their stock is exhausted." [*Id.*]

Chart I.—Notes

(1) Neither the existing (1952) Universal Copyright Convention nor the Paris revision of that Convention permits free translation 10 years after publication. Under article V of both the existing Convention and the Paris revision, all member countries may establish a system of compulsory licenses for the translation of works if, after the expiration of 7 years from first publication, a translation has not been published in the "national language" of (1952 Convention), or a language "in general use in" (Paris revision) in, that state. The compensation due for compulsory licenses under article V is to be "just and [in conformity with] international standards."

Article Vter of the Paris revision of the Universal Convention concedes to developing countries the right to exercise compulsory translation licensing after only 1 or 3 years from first publication, under conditions substantially identical to those of the Berne Convention.

COMPARISON OF CONCESSIONS TO DEVELOPING COUNTRIES UNDER THE EXISTING BERNE CONVENTIONS, THE STOCKHOLM PROTOCOL AND THE PARIS REVISION [1]

ANNEX A

Chart II.—Reproduction Rights

[1] The following tabular summary of the "Paris Revision" relates to the Paris Revision of the Berne Convention. Substantial differences between this Revision and the Paris Revision of the Universal Copyright Convention are indicated by asterisks and explained by "Notes" appearing at the conclusion of the tables. Where no "Note" is indicated, the summary of the "Paris Revision" serves as a summary of the concessions made to developing countries in the Universal Copyright Convention.

EXISTING BERNE CONVENTIONS (ROME, 1928 BRUSSELS, 1948)	STOCKHOLM PROTOCOL (1967)	BERNE PARIS REVISION (1971)
No concessions. The Rome and Brussels Acts do not expressly recognize a general right of reproduction. Whether such a right is implicit in these Acts has been a matter of academic discussion.	The Stockholm Text expressly accords authors the exclusive right of reproducing (and recording) their Works. [Text, Art. 9] The Stockholm text does allow members to permit reproduction in "certain special cases," *provided* that such reproduction "does not conflict with normal exploitation of the Work and does not prejudice the legitimate interests of the author." [*Id.*] It is believed that these conditions avoid the reproduction right being subject to general systems of compulsory licensing, except as permitted to developing countries.	Same as Stockholm [2] Same as Stockholm [3]
No compulsory license.	A developing country may subject the right of reproduction to compulsory licensing. [Protocol, Art. I(c)] The system of compulsory licensing allows the "competent authority" (not defined) of a developing country to authorize the reproduction and publication of Works without the authority of the owner of reproduction rights, on certain terms and conditions. [Protocol, Art. I(c)]	Same as Stockholm [Appendix, Art. III (1)] The system of compulsory licensing allows the "competent authority" (not defined) of a developing country to authorize the reproduction of Works, and the publication thereof at prices reasonably related to those normally charged in the licensing State for comparable Works, without the

All Works are subject to compulsory reproduction licensing. [Protocol, Art. I(c)(i); Text, Art. II]. No special provision is made concerning application of the compulsory license to audio-visual Works.

A compulsory reproduction may only be obtained to reproduce and publish "for educational or cultural purposes." [Protocol, Art. I(c)(i)]

The compulsory reproduction license becomes available three years after first publication of a Work *if* it has not then been published in the licensing State, *or* if all previous editions in the licensing State are out of print. [Protocol, Art. I(c)(i)]

[2] See Note (1).

[3] See Note (1).

authority of the owner of reproduction rights, on certain terms and conditions. [Appendix, Art. III(1)(2)(a)]

All Works published in "printed or analogous forms of reproduction" are subject to compulsory reproduction licensing. [Appendix, Art. III(7)(a)]

Audio-visual Works which were "prepared and published for the sole purpose of being used in connection with systematic instructional activities" may be reproduced in audio-visual form, and the textual portions thereof may be translatted into a language in general use in the licensing State, under the compulsory reproduction license. [Appendix, Art. III(7)(b)]

Translations which are not in a language in general use in the licensing State, or which were produced without the authority of the owner of the underlying Work (including compulsory licensed translations) are not subject to compulsory reproduction licensing.

A compulsory reproduction license may only be obtained to reproduce and publish the Work "for use in connection with systematic instructional activities." [Appendix, Art. III(2)(a)] [4]

The compulsory reproduction license becomes available after a stated number of years from first publication of a Work *if* copies thereof have not then been distributed in the licensing State "at a price reasonably related to that normally charged in that State for comparable Works," *or* no copies have been on sale for six months in that State at "reasonably related" prices. [Appendix, Art. III(2)]

[4] See Note (2).

EXISTING BERNE CONVENTIONS (ROME, 1928 BRUSSELS, 1948)	STOCKHOLM PROTOCOL (1967)	BERNE PARIS REVISION (1971)
		The relevant period is: three years for Works in the area of science, mathematics and technology; seven years for Works of fiction, poetry, drama and music; five years in other cases. [Appendix, Art. III(3)]
	An applicant for a compulsory reproduction license must, "in accordance with the procedure" of the licensing State, establish either:	An applicant for a compulsory translation license must, "in accordance with the procedure" of the licensing State, establish either:
	(1) "That he has requested, and been denied, authorization" by the owner of the reproduction right [Protocol, Art. I(c)(i)];	(1) "That he has requested, and been denied, authorization" by the owner of the reproduction right [Appendix, Art. IV(1)]. In this case:
		—At the time of making his request, the applicant "shall inform" an information center designated by the publisher's country. [Appendix, Art. IV(1)]; and
		—Licenses obtainable after three years may not be granted until after the expiration of a six-month grace period from the applicant's compliance with the foregoing. If, during this grace period, the owner distributes his work at "reasonably related" prices in the licensing State, the license may not be granted. [Appendix, Art. III(4)(e)(i), III(4)(c)]
	or	*or*
	(2) "That, after due diligence on his part, he was unable to find the owner of the right." [Protocol, Art. I(c)(i)]. In this case:	(2) "That, after due diligence on his part, he was unable to find the owner of the right." [Appendix, Art. IV (1)]. In this case:

—The applicant must send copies of his application to the publisher of the Work and a representative of the country of the owner [Protocol, Art. I(c)(ii)]; and

—The license may not be granted until after the expiration of two months from the dispatch of copies of the application [Protocol, Art. I(c)(ii)]

Developing countries establishing a system of compulsory reproduction licenses must make "due provision" to assure:

(1) an "accurate reproduction" [Protocol. Art. I(c)(iii)]; and

(2) a "just compensation" [*Id.*]

Payment and transmittal of compensation is "subject to national currency regulations." [Protocol, Art. I(c)(iii)]

A compulsory reproduction license is generally "valid only for publication in the territory of" the licensing State. [Protocol, Art. I(c)(iv)]

—The applicant must send copies of his application by registered airmail to the publisher of the Work and an information center designated by the publisher's country [Appendix, Art. IV(2)]; and

—The license may not be granted until after the expiration of varying grace periods from the dispatch of copies of the application. If, during this grace period, the owner distributes his work at "reasonably related" prices in the licensing State, the license may not be granted. [Appendix, Art. III(4)(a)(ii), III(4)(b), III(4)(c)]

Developing countries establishing a system of compulsory translation licenses must make "due provision" to assure:

(1) an "accurate reproduction" [Appendix, Art. IV(6)(b]; and

(2) a "just compensation that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned." [Appendix, Art. IV(6)(a)(i)]

If national currency regulations hinder payment and transmittal of compensation, the "competent authority" shall use "all efforts" to ensure transmittal in internationally convertible currency. [Appendix, Art. IV(6)(a)(ii)]

A compulsory reproduction license generally "does not extend to the export of copies" and is "valid only for publication" in the territory of the licensing State. [Appendix, Art. IV(4)(a)] [Copies published under a compulsory translation must bear a notice that the copies are available only for distribution in the licensing State. [Appendix, Art. IV(5)]

EXISTING BERNE CONVENTIONS (ROME, 1928 BRUSSELS, 1948)	STOCKHOLM PROTOCOL (1967)	BERNE PARIS REVISION (1971)
	However, copies may be imported and sold in other countries allowing such importation and sale. [Protocol, Art. I(c)(iv) (effect of next-to-final sentence as negating conditions of prior sentence)]	(But the opportunity to engage in joint translation and reproduction abroad substantially equals the consequences of permitted export. See Chart II pg. 5).
	Copies made under a compulsory reproduction license may be manufactured outside of the territory of the licensing State. [See Report, Main Committee II (Stockholm) par. 14]	Copies made under a compulsory reproduction license may be reproduced in printed form outside the territory of the licensing State if the licensing State has no reproduction facilities (or its facilities are "incapable" of reproducing the copies), all copies are returned in bulk to the licensing State, and the reproducer guarantees that the Work of reproduction is lawful in its country. [General Report on the Paris Conference (Berne) par. 40]
		Such reproduction may only take place in a Berne or Universal Copyright Convention country, and may not be done by a reproduction facility "specifically created" for compulsory licensing purposes. [*Id.*]
		Although the "incorporation of compulsory-translated audio-visual texts into audio-visual Works" may be done outside the territory of the licensing State under the same conditions, these provisions may not apply to all aspects of the reproduction in audio-visual form of the audio-visual work itself. [See Id. at par. 41(a), par. 40],
		Compulsory licensees may employ persons doing preliminary editorial work in other countries. [General Report par. 42].

Compulsory reproduction licenses terminate if authorized copies of the Work are published in the licensing State. [Protocol, Art. I(c)(vi)]	Compulsory reproduction licenses terminate if authorized copies of the Work are distributed in the licensing State at a price reasonably related to that normally charged in that State for comparable Works. [Appendix, Art. III (6)]
Copies made before termination may continue to be sold. [*Id.*]	Copies made before termination may continue to be distributed "until their stock is exhausted." [*Id.*]

Chart II.—Notes

(1) The existing U.C.C. does not specifically guarantee the exclusive right of reproduction. This matter is left to the generality of Article I that each contracting state "undertakes to provide for the adequate and effective protection of the rights of authors and . . . copyright proprietors. . . ." Article IV *bis* of the Paris Revision of the U.C.C. takes this matter somewhat forward as it provides that "the rights referred to in Article I shall include . . . the exclusive right to authorize reproduction by any means." However, the significance of this step is weakened by the succeeding provisions of Art. IV *bis:* "However, any Contracting State may, by its domestic legislation, make exceptions that do not conflict with the spirit and provisions of this Convention. . . . Any State whose legislation so provides, shall nevertheless accord a reasonable degree of effective protection. . . ."

(2) Although the compulsory reproduction license of the Universal Copyright Convention specifically allows reproduction "in audio-visual form" in the case of audio-visual works, printed works produced under compulsory license would have to be reproduced "in tangible form . . . from which [they] can be read or otherwise visually perceived." (Definition of "Publication", Art. VI). A corresponding limitation does not appear in the Berne Conventions and the precise meaning of "publication", particularly as regards reproduction in sound recorded form, is subject to variation among Union countries. (Compare the scope of the compulsory *translation* license under the Paris Revision of Berne, which refers to "publication in printed or analagous forms of reproduction" [Appendix, Art. I(b)(ii)], with that of the *reproduction* license, which refers only to "reproduction and publication" [Appendix, Art. I(c)]. "Reproduction" is defined in Art. 9 of the Paris Text of Berne as including "any sound or visual recording.")

COMPARISON OF CONCESSIONS TO DEVELOPING COUNTRIES UNDER THE EXISTING BERNE CONVENTIONS, THE STOCKHOLM PROTOCOL AND THE PARIS REVISION [1]

ANNEX A

Chart III.—Other reservations: (A) broadcasting rights, (B) duration of protection, (C) general reservation

[1] The following tabular summary of the "Paris Revision" relates to the Paris Revision of the Berne Convention. Substantial differences between this Revision and the Paris Revision of the Universal Copyright Convention are indicated by asterisks and explained by "Notes" appearing at the conclusion of the tables. Where no "Note" is indicated, the summary of the "Paris Revision" serves as a summary of the concessions made to developing countries in the Universal Copyright Convention.

EXISTING BERNE CONVENTIONS (ROME, 1928 & BRUSSELS, 1948)	STOCKHOLM PROTOCOL (1967)	BERNE PARIS REVISION (1971)
Article 11 *bis* of the Rome Convention guarantees the exclusive right of broadcasting. However, all member states are permitted to "regulate" this right, subject to the author's receiving "an equitable remuneration" which may be fixed by the "competent authority" absent agreement. Article 11 *bis* of the Brussels Convention extends this right to include communication of the original broadcast to the public by re-broadcast, wire, loudspeaker or other transmission. All member states are permitted to regulate these rights subject to the same condition of remuneration.	Developed countries are bound by the substance of Art. 11 *bis* of the Brussels text.	*Same as Stockholm.*[1]
No concessions.	Developing countries may restrict the right of communicating the broadcast to the public to those communications "made for profit-making purposes." Developing countries may further regulate this right subject to the condition of remuneration. [Protocol, Art. I(d)] [Protocol, Art. I(a)]	No comparable provision.

No concessions.	Developing countries may limit the general duration of protection to the life of the author and not less than twenty-five years after his death; and the duration of protection of cinematographic, anonymous or pseudonymous works to not less than twenty-five years after it has been made available to the public. [Developed countries are bound to fifty year terms in each case. Text, Art. 7(1)–(3)]	No comparable provision.
	Developing countries may limit the term of protection of photographic Works and Works of applied art to not less than ten years from the making of such Works. [Developed countries are bound to protect such works for not less than twenty-five years from their making. Text, Art. 7(4)]	
	[Protocol, Art. I(e)]	
No concessions.	Developing countries may restrict the protection of all rights in any Work, "exclusively for teaching, study and research in all fields of education." A developing country making such restriction must make "due provision" to assure a compensation which "conforms to standards of payment made to national authors." Payment and transmittal of such compensation is subject to national currency regulations. Copies published under such restrictions may be imported and sold for "teaching, study and research purposes" in other developing countries which have invoked these restrictions and do not prohibit such importation and sale.	Not set forth as separate provision; however, see Charts I and II for effect of similar concessions on the interests of authors and publishers of educational materials.

EXISTING BERNE CONVENTIONS (ROME, 1928 & BRUSSELS, 1948)	STOCKHOLM PROTOCOL (1967)	BERNE PARIS REVISION (1971)
	Importation into developed countries is prohibited without the agreement of the author or his successor.	

Chart IIIA.—Broadcasting Rights, Notes

(1) The existing U.C.C. does not specifically guarantee the exclusive right of broadcasting. This matter is left to the generality of Article I that each contracting state "undertakes to provide for the adequate and effective protection of the rights of authors and . . . copyright proprietors. . . ." Article IV *bis* of the Paris Revision of the U.C.C. takes this matter somewhat forward as it provides that "the rights referred to in Article I shall include . . . the exclusive right to authorize . . . broadcasting." However, the significance of this step is weakened by the succeeding provisions of Art. IV *bis*: "However, any Contracting State may, by its domestic legislation, make exceptions that do not conflict with the spirit and provisions of this Convention. . . . Any State whose legislation so provides shall nevertheless accord a reasonable degree of effective protection. . . ."

[1] See Note (1).

EXHIBIT B

DEPARTMENT OF STATE,
Washington, D.C., June 21, 1972.

Hon. J. W. FULBRIGHT,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I am replying to your letter of June 7 in which you inquire on behalf of Mr. Raymond C. Hagel, Chairman of the Board of Crowell, Collier and MacMillan, Inc., about certain provisions contained in the Universal Copyright Convention (UCC) as revised at Paris in July 1971. Representative Fraser and Senator Case have also written us about Mr. Hagel's interest and I have sent them similar replies.

The Executive Branch of the Government, along with the Copyright Office, believes that ratification of the revised UCC is in the national interest. As we see it, there are two basic questions involved in Mr. Hagel's letter and the legal presentation attached to it. The first is whether or not the U.S. should ratify the revised convention, and the other is whether authors and publishers should be compensated for any losses which might possibly occur under the provisions in the revised convention which establish procedures for the translation and reproduction of copyrighted works in developing countries.

I shall limit my comments to the first question. The second question raises the issue of domestic compensatory legislation and falls more within the Congress' area of competence than ours.

I have already stated that the Department supports ratification of the UCC. It is our considered opinion that the revised convention is essential to the maintenance of the international copyright system as we know it today. Indeed, we believe that in certain respects, it may strengthen international copyright protection. At the same time, it will provide concrete evidence of the concern of the United States for the legitimate needs of developing countries in the field of education.

I believe it would be helpful to provide you with some background on this matter. The revision of the UCC came about largely as a result of a crisis in international copyright protection which occurred in 1967. It was at this time that the Stockholm Protocol, to which Mr. Hagel refers in his letter, was appended to the Berne Copyright Convention as an integral part of that Convention. The Berne Convention is the other major international copyright convention. While the U.S. does not adhere to Berne, many countries belonging to the UCC also adhere to Berne and the two conventions are closely related.

The developed countries party to the Berne Convention found themselves unable to ratify the Stockholm Protocol. The developing countries, insisting that formal recognition of their special needs was essential, threatened to withdraw from Berne. Because of a special clause in the UCC, countries renouncing Berne could not rely on the UCC for protection in other UCC-Berne countries. The result of renunciation of Berne would have been the exodus of the developing countries from both major copyright conventions and a virtual collapse of the international copyright system as we know it today.

In the face of this situation, it was decided to revise both the Berne and Universal Copyright Conventions in such a way that both developed and developing countries could accept their terms. This was the compromise worked out in 1971 at the Diplomatic Conference. It was a compromise arrived at through careful and lengthy negotiations in which over 60 countries participated or had observer delegations, including virtually all the major developing and developed countries. It should be noted that the fundamental U.S. negotiating position was worked out prior to the Conference through numerous consultations with all the interested copyright groups in the United States. As a matter of fact, most of these same groups were represented on the U.S. Delegation to the Conference.

The compromise does not "permit unauthorized and unpaid use by 'developing' nations for 'educational' purposes, as Mr. Hagel states. Rather, the revised UCC provides for the issuance of compulsory licenses for the use of copyrighted materials for educational purposes when such materials are not made available by the copyright owners during varying time periods, and states that "due provision shall be made at the national level to ensure" that compulsory licenses provide for "just compensation that is consistent with standards of royalties normally operating in the two countries concerned."

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The provision for compulsory licensing is by no means new, a provision for compulsory licensing for translation rights has been contained in the Universal Copyright Convention since its inception in 1955. As far as we are aware, not one country has exercised the right to a compulsory license under that provision. Rather, terms have been worked out between the parties involved without the need for recourse to the treaty. It is quite possible that this will occur under the revised treaty, should it go into force.

It is important to note that the developing countries have the option of not adhering to either the Universal Copyright Convention or the Berne Convention, should these conventions not prove satisfactory to them. In such a case, they would also have the option of adopting national legislation which would provide for the use of foreign works without any license or payment whatever or with compulsory licensing provisions that might prove far more onerous than those contained in the two revised conventions.

It is the State Department's belief that the revised UCC constitutes a fair and just compromise and that failure on the part of the U.S. to ratify the convention could presage a return to the previous state of chaos in the international copyright field. Such a result would, of course, be detrimental to all interests concerned and especially to U.S. authors and publishers whose works are so widely used throughout the world.

In recognition of this fact, the Association of American Publishers, along with many other major copyright groups, including the American Bar Association, have firmly endorsed U.S. ratification of the UCC.

I hope this information will aid you in responding to Mr. Hagel. I have also enclosed a chart prepared by the Copyright Office which compares the provisions for developing countries contained in the revised conventions to those contained in the Stockholm Protocol. I believe this study will be of interest to you and should be helpful if read in conjunction with the study prepared by Mr. Hagel's attorneys. Please do not hesitate to contact me if I can be of any further assistance.

Sincerely yours,

DAVID M. ABSHIRE,
Assistant Secretary for Congressional Relations.

[Enclosures.]

COLUMNAR COMPARISON OF SPECIAL PROVISIONS FOR DEVELOPING COUNTRIES IN THE STOCKHOLM PROTOCOL AND THE PARIS REVISIONS (1971) OF THE U.C.C. AND BERNE CONVENTIONS

PART I: CRITERIA, DURATION, TIME OF ELECTION

STOCKHOLM PROTOCOL	PARIS REVISION OF THE U.C.C.	PARIS REVISION OF BERNE—APPENDIX
Criteria		
Article 1, Preamble: "regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations."	Article V*bis*(1): same as the Stockholm Protocol.	Article I(1): same as the Stockholm Protocol; new member developing countries may invoke reservations.
Duration		
10 year initial period under Article 1, Preamble, plus, under Article 3, right to extend period indefinitely until adherence to new Act that prohibits reservations; but, under Article 4, cannot maintain reservations if no longer regarded as a developing country—notification by Director General and reservations cease 6 years thereafter.	Article V*bis*(2) and (3): renewable 10 year periods until country becomes developed; cut-off point at end of current 10 year period or 3 years after country ceases to be a developing one, whichever expires later.	Article I(2) and (3): same as UCC; renewable 10 year periods until country becomes developed; cut-off point at end of current 10 year period or 3 years after country ceases to be a developing one, whichever expires later.
Time of Election		
Article 1, Preamble: upon ratification or accession.	Article V*bis*(1): at the time of ratification, acceptance, or accession, or thereafter.	Article I(1): same as UCC; at the time of ratification or accession, or at any time thereafter.

STOCKHOLM PROTOCOL	PARIS REVISION OF THE U.C.C.	PARIS REVISION OF BERNE—APPENDIX
Term of Protection		
Article 7 of the Convention as modified by Article 1(a) of the Protocol: life plus 25 years, in general.	No special provision; under Article IV: life plus 25 years, in general.	No special provision; governed by Article 7 of the Convention: life plus 50 years, in general.
General Education Exemption		
Article 1(e): broad reservation permitting limitations on any economic right of authors for purposes of "teaching, study and research" in all fields of education, subject to compensation that conforms to standards of payment for national authors.	Omitted completely.	Omitted completely.

PART III: TRANSLATION RESERVATION

STOCKHOLM PROTOCOL	PARIS REVISION OF THE U.C.C.	PARIS REVISION OF BERNE—APPENDIX
Article 1(b): 3 year period for all languages; right ceases 10 years from first publication unless exercised; *no* purpose restriction; export *permitted.*	Article V of the U.C.C., as modified by Article V*ter:* essentially, 3½ years for "world languages" and 1¾ years for "non-world languages"—paragraphs (1) and (2); all languages subject to "teaching, scholarship or research" restriction—paragraph (3); Export *prohibited*, subject to exception for copies sent to nationals in another country for teaching, scholarship, or research and without commercial purpose (translations in English, French, and Spanish may not in any case be exported)—paragraph (4); prohibition on export also subject to exception where printing within licensing State not economically or practically feasible and under limitations regarding place of printing, whether printing lawful, and copies must be returned in bulk to the licensee.	Articles II and IV: generally same as UCC.
Note: alternative to apply 10 year translation reservation based on Paris Act of 1896, subject to material reciprocity.		Note: irrevocable choice between Article II reservation and 10 year translation reservation based on Paris Act of 1896, with no material reciprocity; may elect latter when developed, subject to material reciprocity—Article V.
No statement required limiting distribution to licensing State; no copyright notice required.	Copies in all languages must bear statement that they are only available for distribution in State where license applies; retaining copyright notice must be given by licensee if original work bore U.C.C. notice—paragraph (4).	Same as U.C.C., except no copyright notice required.
"Just compensation" for licenses during 3–10 year period; no compensation after 10 years if author failed to publish translation.	"Just compensation that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned"—paragraph (5).	Same as U.C.C.

STOCKHOLM PROTOCOL	PARIS REVISION OF THE U.C.C	PARIS REVISION OF BERNE—APPENDIX
Assurance of payment and transmittal subject to national currency regulations.	Assurance of transmittal of payment; if national currency regulations intervene competent authority shall make all efforts by use of international machinery to ensure payment in internationally convertible currency—paragraph (5).	Same as U.C.C.
Recapture exclusive right by publication of translation within 10 years of first publication.	Terminate Article V*ter* license and foreclose further Article V*ter* licenses if authorized translation in same language and with substantially the same content is published at a price reasonably related to that normally charged for comparable works—paragraph (6). Note: after 7 years, licensee is free to seek new license governed exclusively by Article V—paragraph (9) of Article V*ter*; Article V license available to any national of Contracting State without recapture.	Recapture exclusive right at any time if authorized translation in same language and with substantially the same content is published at a price reasonably related to that normally charged for comparable works.
No comparable provision.	License to translate a work published in printed or analogous forms of reproduction may be granted to broadcasting organizations in developing countries if made for the purpose of broadcasting, without any commercial purpose, and if sole purpose of broadcast is use for teaching or dissemination of results of technical research, and if broadcasts intended for reception in same developing country—paragraph (8).	Same as U.C.C.
No comparable provision.	Under same conditions as above, license may also be granted to a broadcasting organization for translation of "any text incorporated in an audiovisual fixation which was itself prepared and published for the sole purpose of being used in connection with systematic instructional materials"—paragraph (8).	Same as U.C.C.

PART IV: REPRODUCTION RESERVATION

STOCKHOLM PROTOCOL	PARIS REVISION OF THE U.C.C.	PARIS REVISION OF BERNE—APPENDIX
Article 1(c): compulsory licensing system after 3 years unless right exercised by reproduction in original form in country where license might be sought.	Article: *Vquater:* exclusive period 5 years generally; exceptions: 3 years for works of the natural and physical sciences, including mathematics and of technology; 7 years for works of fiction, poetry, drama and music, and for art books; license available unless authorized copies generally distributed in that State to public or in connection with systematic instructional activities at price reasonably related to that normally charged in State for comparable works—paragraph (1).	Articles III and IV: same as U.C.C.
Compulsory license to reproduce and publish for "educational and cultural purposes".	License only for use in connection with "systematic instructional activities."	Same as U.C.C.
"Just compensation" for compulsory licenses.	Just compensation that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned—paragraph (2).	Same as U.C.C.
Assurance of payment and transmittal subject to national currency regulations.	Assurance of transmittal of payment; if national currency regulations intervene, competent authority shall make all efforts by use of international machinery to ensure payment in internationally convertible currency—paragraph (2).	Same as U.C.C.
Export *permitted.*	Export *prohibited* as a rule—paragraph (1); however, printing abroad and subsequent return of copies in bulk permitted if printing not possible in licensing State due to lack of physical facilities or economic capability, subject to limitations: place of printing must be U.C.C. or Berne country, and the printing must be lawful in that country.	Same as U.C.C.

STOCKHOLM PROTOCOL	PARIS REVISION OF THE U.C.C.	PARIS REVISION OF BERNE—APPENDIX
No comparable provision.	Copies must bear notice stating available for distribution only in State where license applies—paragraph (2).	Same as U.C.C.
License to reproduce "literary or artistic work."	License to reproduce literary scientific or artistic works that have been published in "printed or analogous forms of reproduction"—paragraph (3).	Same as U.C.C. but with general reference to "works."
Recapture exclusive right by reproduction and publication in country concerned.	Recapture exclusive right by general distribution to public or in connection with systematic instructional activities at price reasonably related to charge in State for comparable works if substantially same language and content as edition published by licensee—paragraph (2).	Same as U.C.C.
No comparable provision.	Notice of copyright must be printed by licensee if the original work bore U.C.C. notice—paragraph (2).	No comparable provision.
No comparable provision.	License to reproduce audiovisual fixations and translation of accompanying text into language in general use in the country concerned if "prepared and published for the sole intrinsic purpose of being used in connection with systematic instructional activities"—paragraph (3).	Same as U.C.C.
License to reproduce work "in the original form in which it was created."	No compulsory license may issue to reproduce translation not published by the proprietor or under his authority nor to reproduce translation that is not in a language that is in general use in State issuing the license—paragraph (1).	Same as U.C.C.

PART V: BROADCASTING RESERVATION

STOCKHOLM PROTOCOL	PARIS REVISION OF THE U.C.C.	PARIS REVISION OF BERNE—APPENDIX
Article 1(d): Substitute for Article 11*bis*(1) and (2) provisions that essentially correspond to the text of the 1928 Rome Convention on the broadcasting right. National legislation may regulate conditions, i.e. establish compulsory licensing system throughout term of copyright; right of authorizing broadcast and communication to public of broadcast if communication for profit-making purposes; licenses subject to payment of "equitable remuneration."	No special provisions for developing countries. Article IV*bis* expressly recognizes the right to broadcast either in the original form or in any form recognizably derived from the original. National legislation may make exceptions that do not conflict with the spirit of the fundamental right; must accord "reasonable degree of effective protection."	No special provisions for developing countries. Article 11*bis* of the Convention.

EXHIBIT C

LINDEN AND DEUTSCH,
New York.

PARIS REVISION OF THE UNIVERSAL COPYRIGHT CONVENTION—A RESPONSE TO COMMENTS OF THE DEPARTMENT OF STATE

This statement is in response to comments of the Department of State received in reply to our prior analysis of the Paris revision of the Universal Copyright Convention. This response is limited to points directly made by the Department in its letter of June 21, 1972 to Senator Fulbright. Additional points and amplifications are raised in our prior analysis.

The Department of State correctly recognizes that our comments are directed at two questions. The Department has declined to give any opinion on the second of these, namely, whether Congress should provide a means for compensating American authors and publishers who suffer financial injury by reason of the concessions granted to developing countries under the revised Universal Copyright Convention. Indeed, the Department's letter does not appear to contradict the likelihood of such injury, except to question the extent to which the developing countries will resort to the proposed compulsory licenses and to point to the fact that such countries might unilaterally impose more burdensome conditions in their own copyright laws.

We shall return to both of these points below; at this point we would simply note the Department's conclusion that "ratification of the revised UCC is in the national interest." We do not share this view. If, however, after a full examination of the facts the Senate should decide to ratify the revised Convention, the Trade Expansion Act of 1962 is ample precedent for Congress' obligation to compensate those American citizens who will be injured in the interests of our foreign policy goals.

The first question raised is whether the Senate should ratify the revised Convention. Although the questions are distinct, the answers cannot be separated. We do not believe that Congress should decide whether to adopt a course of action likely to cause economic injury to a class of American citizens without considering what devices are available to mitigate such injury.

The Department notes that "the Association of American Publishers, along with many other major copyright groups, including the American Bar Association, have firmly endorsed U.S. ratification of the UCC." We will concede that, at the present time, our position against ratification appears to be a minority one. It is shared, however, by several other publishers. We daresay that many of those groups which have endorsed ratification have done so with insufficient consideration of the potential impact of the revisions and might be disposed to modify their position upon a full examination of the facts. We refer, in this connection, to a recent article by counsel to the Authors' League, a copy of which is enclosed, entitled "Downgrading the Protection of International Copyright" in which Mr. Karp in essence holds that the Paris Revision of the UCC is the same sellout of authors and publishers as the notorious Stockholm Protocol. We would also note that it is one particular group, authors and publishers of educational materials, who will suffer most of the adverse effects of the revised Convention and that the viewpoints of this particular group have not been expressed publicly to date.

The chart prepared by the Copyright Office and included with the State Department's reply to Senator Fulbright is not inconsistent with the study prepared by our office. Both lead to the conclusion that the "improvements" of the Paris revision over the terms of the Stockholm Protocol are principally of a procedural nature, subject to application, interpretation, and implementation by each developing country. So far as authors and publishers of textbooks and other educational material are concerned, any improvements are minimal or illusory. Examples illustrative of this conclusion are given in our initial analysis of the Paris revision.

The Department's letter also points to the possible steps which may be taken by developing countries if not granted the concessions embodied in the revised UCC. We are not persuaded that the revision will not lead to substantially similar results even within the framework of an international convention. Furthermore, a number of developing countries already are members of either the Berne or Universal Copyright Conventions and their willingness to take steps requiring withdrawal from their existing Convention obligations is likely to be tempered by poli-

tical considerations. Even if that were not the case, we cannot accept the notion that we should allow ourselves to be blackmailed into concessions injurious to the interests of American citizens. Foreign countries may wish to expropriate the tangible properties of American citizens situated abroad, but we have never consented to any prior, formal multinational legitimazation of such practices because of threats that it will be done anyway.

The Department states that, based upon experience with Article V of the existing UCC, it may be doubted that the compulsory licensing provisions will be utilized. To begin with, the new translation license of the Paris revision may become available sooner than is the case with the existing UCC provision; also, the concessions allowing foreign translation and manufacture facilitate use of the licenses. More significantly, perhaps, the compulsory license provisions obviously do not have to be resorted to in order to have their adverse effect. Their mere availability is sufficient to deprive international bargaining of any semblance of free negotiation. Where the requesting party may use a refusal by an owner of rights as a vehicle to more favorable terms, it becomes difficult for us to understand how "terms [can be] worked out between the parties involved without the need for recourse to the treaty." It is equally difficult to understand the zeal with which the developing countries sought the compulsory license provisions, and the piratical consequences the Department feels will enure if such concessions are not granted, if the provisions are not to be used.

The Department states that the revised UCC does not permit unpaid use, but requires that " 'due provision shall be made at the national level to ensure' that compulsory licenses provide for 'just compensation that is consistent with standards of royalties normally operating in the two countries concerned.' " It is obvious that the "due-ness" of the provisions, the "just-ness" of the compensation and its "consistency" with prior standards are subject to varying interpretations and considerations among each of the developing countries. It is not unwarranted to assume that what developing countries may deem "just compensation" to American authors and publishers will be less than a pittance. Similarly, in the area of audio-visual works and similar materials of the new educational technology, any pre-existing standards are illusory if not nonexistent; yet such materials require a great deal of investment of author and publisher time, expense and effort. We reiterate our opinion that, in practice, the compensation that actually would be paid under compulsory licensing can only be described as negligible.

The Department also states that ratification of the revised UCC "will provide concrete evidence of the concern of the United States for the legitimate needs of developing countries in the field of education." These needs are valid. We question, however, whether it is the function of a class of individual American citizens to fulfill them upon terms imposed by an international, governmental agreement. Would not governmental loans abroad or governmental purchases under Constitutional guarantees and resale abroad or some similar means be more appropriate? The "educational needs" of developing countries also include schoolrooms, construction equipment, and instructional apparatus; to our knowledge, the producers of such physical properties have not been asked to make the sacrifices now to be required of owners of intangible property—American authors and publishers.

Should Congress decide, for some reason we cannot now acknowledge, that the fulfilling of "educational needs" is an individual function, there are the additional questions of whether the revised UCC is properly constructed to meet that end with adequate safeguards against appropriation of American property under circumstances not legitimately related to such needs; and of why the individuals should not be compensated for injuries occasioned by their contribution.

B. L. Linden

EXHIBIT D

[From Publishers Weekly, Sept. 27, 1971]

Downgrading the Protection of International Copyright

(By Irwin Karp)

"Developed" and "developing" nations alike will want to study the diminished degree of international copyright protection which is foreseen in reports of major copyright revision conferences held in July in Paris.

Revised texts of the 1952 Universal Copyright Convention and Berne Convention were adopted at conferences held in Paris from July 5 to July 24. The pur-

pose of the revisions, embodied in identical provisions of both new conventions, is to allow "developing countries" to diminish copyright protection by granting compulsory licenses to translate and reproduce books and audio-visual materials without the copyright owners' consent.

The 1971 UCC becomes effective when ratified by 12 countries. It must be ratified by the United States to apply to American works. Although the United States could not accede to the new Paris (Berne) Act until the 1909 Copyright Act is revised, the Paris Act will not become effective until the United States, France, Britain, and Spain agree to be bound by the 1971 UCC. A United States delegation participated in the UCC conference and sat as observer at the Berne conference.

STOCKHOLM PROTOCOL REVISITED

The Paris conferences climaxed four years of maneuvering that began with the Stockholm revision of the Berne Convention. At Stockholm, developing countries argued that they must have "freer access" to foreign copyrighted works than the Berne Convention permitted, to improve their education and culture. "Developing country," it should be noted, is an elastic term of formidable reach. It includes countries truly in early stages of economic and cultural development, such as the new African states. It also stretches to embrace Brazil, Yugoslavia, Israel, India, and many other nations well enough developed to maintain large armed forces, extensive government bureaucracies, publishing industries, and other amenities one ordinarily associates with "developed" countries. In fact, under the definitions in both new conventions, a substantial majority of United Nations members would qualify as developing countries, entitled to exercise compulsory licensing privileges.

"Freer access" also is an elusive term. At times it seemed to mean an improvement in communication between developing countries and authors or publishers in developed countries, so that voluntary licenses could be negotiated more easily. But ultimately it connoted something more drastic, *i.e.*, the privilege of translating or reproducing an author's work without his permission, or at a royalty lower than he asked for a voluntary license he is willing to grant.

A NEW KIND OF "FREE ACCESS"

A nation outside the copyright conventions can give itself this kind of "free access." It can, like the Soviet Union, allow its publishing houses, state or privately owned, to translate and publish foreign works without their authors' consent. It need not pay any royalties; or it can fix whatever rate it chooses. And, like the USSR, it can make the royalties non-exportable when it chooses to allow them. However, a country bound by a copyright convention cannot override authors' rights so easily. It must protect the works of other member countries according to the standards of its convention. If it wants to appropriate works in violation of the standards, it must leave the convention. Or it can try to have the convention amended, downgrading the standards of protection to the point where it is free to adopt compulsory licensing, preferably while requiring other countries to continue giving full protection to its authors.

The developing countries of the Berne Union successfully employed this tactic at Stockholm in 1967. The Stockholm Act made several changes in the Berne Convention, including the appending of a Protocol to the main text. The Protocol contained a set of exemptions permitting the developing countries to grant compulsory translation and reproduction licenses, to "limit" the economic rights of authors for purposes of teaching and study, and to make other encroachments on the standards of protection required of member countries in the main text. When the panic subsided, developed countries realized they almost had surrendered too much of their authors' rights. They did not ratify the Protocol, and it never became applicable to their authors and publishers. The developing countries did not stalk out of Berne, or the UCC.

But talk of an exodus persisted; and developing countries continued to argue for "freer access" to copyrighted works of developed countries. In 1969 a joint UCC-Berne study group recommended the simultaneous revision of both conventions. And in 1970 revised texts were drafted for the Revision Conferences by UCC and Berne committees, each consisting of several developing and developed countries. The final draft texts were the result of two rounds of negotiations and preparation in which the developing and developed countries made concessions and gave up rights to reach a "delicate balance"—a compromise frequently referred to at the Paris conferences as "the package deal."

The developed countries expected that the draft texts would be adopted without substantive changes by the conferences, since they were the result of substantial compromises and thorough consideration. Their opening speeches emphasized the need for maintaining the "delicate balance" and not reopening the "package deal." But developing countries reopened the "package deal" and made changes, through amendments of the text and adoption of "interpretations" in the Report.

Since the United States is a member of the UCC and not of Berne, and since the same basic changes were made in both conventions, the discussion is keyed to the 1971 UCC.

THE BERNE SAFEGUARD CLAUSE

Article XVII of the 1952 UCC and the Appendix Declaration prevented any country belonging to both conventions from leaving Berne and relying on UCC for protection, in other Berne-UCC countries. The 1971 UCC eliminates this condition for developing countries, allowing them to leave Berne and retain UCC protection in any other country belonging to both conventions.

REPRODUCTION, PERFORMANCE RIGHTS

Article I of the 1952 UCC requires member states to "provide for the adequate and effective protection of the rights of authors and other copyright proprietors." It remains unchanged in the 1971 text, and is supplemented by a new article, *IV bis*, which states that the rights mentioned in Article I "include the basic rights insuring the author's economic interests, including the exclusive right to authorize reproduction by any means, public performance and broadcasting."

While some observers see *IV* as upgrading the level of protection in UCC, it is doubtful that it adds much to the present obligation of Article I to provide "adequate and effective protection of the rights of authors." Moreover, Article *IV bis* allows member states to carve exceptions into these "exclusive" rights, declaring that any state may "make exceptions that do not conflict with the spirit and provisions of this Convention, to the rights" of reproduction, public performance and broadcasting, so long as a "reasonable degree of effective protection" is provided. This could cover a wide range of exceptions which copyright experts in other countries might devise, particularly since their courts will be the only effective forums for deciding whether the "exceptions" they legislate comply with the provisions of *IV bis* of the UCC.

DEFINITION OF DEVELOPING COUNTRY

Article *V bis* defines a developing country as one so regarded "in conformity with the established practice of the U.N. General Assembly." There is no explicit practice, or list of developing countries. The U.N.'s Committee on Assessments has considered "developing countries" as those with a per capita income of $300 or less. But the developing countries at Paris strongly resisted the suggestion that this or any other concrete criteria be approved by the two Conferences. From a practical viewpoint, every country in both conventions may be free to decide for itself whether it is a developing country. Practically every South American, African, Middle Eastern, and Asian nation except Japan could qualify, as well as some European countries.

A developing country which notifies the Director General of UNESCO that it wishes to exercise the compulsory licensing provisions of the UCC may do so for ten years after the Convention comes into force and may renew the privilege for further ten-year periods.

THE PRESENT TRANSLATION LICENSE

Article V of the 1952 UCC guarantees the author's exclusive right of translation of his work for seven years following initial publication. Thereafter, if an authorized translation has not appeared in any country's national language or if the authorized translation is out of print, the country may grant its nationals nonexclusive licenses to translate and publish the work in its language. The applicant must have requested and been denied authorization by the owner of the translation right, or given notice to the publisher and designated diplomatic officials or organizations, if the owner cannot be found. The Article applies to all members of the Convention.

Article V requires assurance of just compensation, payment, and transmittal; a correct translation, and the title and owner's name printed on every copy. Very few compulsory licenses have been granted under Article V, perhaps because of the seven-year requirement.

THE NEW TRANSLATION LICENSE

The 1971 UCC retains Article V, with a few insubstantial changes. But it also adds a new Article *V ter* which permits developing countries—for purposes of "teaching, scholarships or research"—to grant compulsory licenses *three* years after publication, instead of seven, for translation into languages that are in general use in developed countries; and to grant licenses *one* year after initial publication for translation into languages not generally used in developed countries. Thus, a South American developing country could grant a license to translate an American novel into Spanish three years after it was first published in the United States, while India could grant a license to translate it into Kashmiri or Bengali one year after publication—if an authorized translation had not been published in that language or, if published, had gone out of print. These compulsory licenses are subject to the conditions of Article V and additional conditions of *V ter*, discussed below.

THE REPRODUCTION LICENSE

The 1971 UCC would also permit developing countries to grant non-exclusive compulsory licenses to reproduce works for "use in connection with systematic instructional activities." The license would permit reprinting of books in their original language and the reprinting of translations authorized by the owner, provided the language was in general use in the country granting the license.

The license can be granted if, within a specified period of time following initial publication of an edition, the owner has not distributed copies in the country "to the general public or in connection with systematic instructional activities at a price reasonably related to that normally charged in the State for comparable works. . . ." The grace period for fiction, poetry, drama, music, and art books is seven years from publication; for scientific and technological books, three years; and for others, five years. Reproduction licenses may also be granted if, during a six-month period, no authorized copies are on sale to the public or for systematic instructional materials at a "reasonably related" price.

WORKS SUBJECT TO LICENSES

Reproduction licenses under *V quater* apply only to literary, scientific, or artistic works published in printed or analogous form, and to those audio-visual works, including incorporated text, which were prepared and published for the sole purpose of being used in connection with systematic instructional activities.

Translation licenses under *V ter* apply to "writings" and permit "publication" of the translation. "Publication" means reproduction and distribution of copies which can be read or otherwise visually perceived; and, according to Article I of the UCC, a "writing" is a separate category of work, distinct from "musical, dramatic and cinematographic works, and paintings, engravings and sculpture. However, licenses to translate works composed mainly of illustrations may also authorize the reproduction of the illustrations, subject to the conditions of *V quater*. The Conference agreed that the lyrics of songs were not subject to the translation license.

Article *V ter* also allows developing countries to license broadcasting organizations to translate published works for use in non-commercial broadcasts intended for teaching or disseminating the results of research, or in recordings used for such broadcasts; the license may also cover texts of audio-visual works which were prepared for use in systematic instructional activities.

Developing countries which grant compulsory licenses are protected from retaliation. Thus no developed country can reduce the level of protection which it is obliged to give to works from such developing countries.

CONDITIONS OF COMPULSORY LICENSES

Articles *V ter* and *V quater* impose substantially similar conditions for the granting of compulsory translation and reproduction licenses. The applicant for the license must have requested and been denied authorization by the owner of the particular right, and must inform a designated information center of his request. If the owner cannot be found, copies of the license application must be sent to the publisher and a designated information center. A translation license cannot be granted until a further six months (for 3-year licenses) or nine months (for 1-year licenses) after the applicant requests a license from the owner or sends his application to the publisher. No license can be granted if an authorized trans-

lation is published during this period. There is a similar six-month grace period for reproduction licenses, but it is concurrent. The grace period for translation begins after expiration of the one- or three-year period.

Translation and reproduction licenses are not transferable; do "not extend to the export of copies," and are "valid only for publication in the territory" of the licensing country. Copies must bear a notice that they are for distribution only in the licensing state, the UCC copyright notice where required, the title, and the author's name. Translations must be "correct," reproductions must be "accurate."

Due provision must be made "at the national level" to insure that licenses provide "just compensation" consistent with normal royalty standards for "freely negotiated" licenses between persons of the two countries, and payment and transmittal. However, if currency regulations interfere (implying they may), "all efforts" should be made to insure transmittal in international convertible currency "or its equivalent."

TERMINATION OF COMPULSORY LICENSES

A compulsory translation license under *V ter* is terminated if a translation is published in the developing country by the owner (or with his authorization) with substantially the same content as the edition for which the license was granted, at a price reasonably related to that normally charged in the country for comparable works. A compulsory reproduction license is also terminated by distribution of authorized copies of the edition in the country, at "reasonably related" prices, to the general public or in connection with systematic instructional activities. In either case any copies made before the license is terminated can continue to be distributed. Translation and reproduction licenses cannot be granted when the author has withdrawn all copies from circulation.

These provisions were essentially the provisions of *V ter* and *V quater*, as set forth in the draft texts submitted to the UCC and Berne revision conferences—the "package deal." However, the "package" was opened and its contents considerably changed by adding further provisions to the text and by adopting "interpretations" which could influence the application of the license provisions as effectively as formal amendments. These are some of the changes.

(1) The right of translation was extended to include broadcasting.

(2) While compulsory licenses to translate into languages in general use in developing countries were only to be granted three years after publication, *V ter* was amended at the conferences to permit a developing country to grant such licenses after one year if all developed countries using the language agree. Thus, Brazil, by agreement with Portugal, will be free to translate American novels and other works into Portuguese, Brazil's national language, one year (plus nine months) after publication in the United States. The three-year limit cannot be reduced for compulsory license translations into English, French, or Spanish.

HOW BROAD IS "SCHOLARSHIP"?

(3) The one- and three-year compulsory translation licenses were supposed to be used, according to *V ter*, "only for the purpose of teaching, scholarship or research." However, the Report of the UCC conference states that "scholarship" refers not only to instructional activities in schools and colleges "but also to a wide range of organized educational activities intended for participation at any age level and devoted to the study of any subject." Delegates from developing countries made it clear that they understood the area of use to be extremely broad, and that it included the sale of copies to the public. Similarly, the compulsory reproduction license, according to *V quater*, was supposed to be used for the publication of editions "for use in connection with systematic instructional activities." However, the Report states that "this term is intended to include not only activities in connection with the formal and informal curriculum of an educational institution, but also systematic out-of-school education." And some delegates again indicated their view that sale of copies to the public was permitted. Discussion at the conference reflected broad, loose interpretation of educational and instructional activities that could easily encompass the translation or reproduction—and general sale—of novels and other trade books on optional reading lists of schools, adult education centers, radio or television lecture series, correspondence courses, and the like. Some delegates indicated their belief that any use that promoted "culture" served an educational purpose.

(4) A basic premise of the "package deal" was that copies produced under compulsory licenses could not be exported; and licenses were to be "valid only

for publication in the territory" of the developing country which grants the license. However, the developing countries succeeded in amending *V ter* to allow a licensing country to export copies of translations produced under compulsory license, in any language except French, English or Spanish, to its nationals in other countries, for "teaching, scholarship or research."

(5) A fundamental question is whether the holder of a compulsory license can have the copies printed in another country. If a developing South American, African or Asian country grants one of its nationals a license to translate or reproduce an American biography, novel or textbook, may he have the edition printed in Taiwan, or East Germany, or Czechoslovakia? May he hire a translator in another country? And may nationals of several countries, all granted compulsory licenses for the same American work, use the same translator and have their copies produced abroad by the same printer? Developing countries strongly resisted an explicit requirement that printing be done in the country granting the compulsory license. They argued that some countries did not have the facilities to print translations or reproductions.

It was also argued, incorrectly, that this imposed a "manufacturing clause." But the manufacturing clause requires an American author to print his books in the U.S. as a condition for securing U.S. copyright. The printing limit proposed by Argentina and Great Britain was a limit on developing countries that grant compulsory licenses, to protect the author against an expanded use of those licenses. The limit would not restrict the author's right to have his book printed where he chooses. If he grants a voluntary license to a publisher in a developing country, the limit would not apply.

Actually, the limitation was already inherent in the provisions of *V ter* and *V quater* which prohibited the export of copies made under compulsory licenses and prescribed that the licenses "be valid only for *publication*" in the licensing country. Artilce VI of the UCC defines "publication" as "the reproduction in tangible form and distribution to the public of copies of a work . . ."

After much discussion, a formal "interpretation" of Articles *V ter* and *quater*, and the corresponding Articles in the Berne Convention, was prepared by a joint drafting committee of Berne and UCC countries for insertion in the reports of both conferences. The interpretation has essentially the same effect as an amendment of the texts. It declares that the provisions prohibiting "export" of copies and making compulsory licenses "valid only for publication" in the country granting the license "are considered as prohibiting a licensee from having copies reproduced outside" that country. However, it then declares that the prohibition does not apply where the licensing state does not have printing or reproduction facilities, or its facilities "are incapable for economic or practical reasons of reproducing the copies"; the copies are reproduced in a Berne or UCC country; they are returned in bulk to the licensee; the reproduction is lawful where done; and it is not done in a plant especially created for reproducing works covered by compulsory licenses. The interpretation also states that *V ter* and *V quater* do not prohibit a compulsory licensee from employing a foreign translator, or several licensees in different countries from using the same unpublished translation. The interpretation states that no compulsory license should be used for commercial purposes.

EFFECT ON AUTHORS' RIGHTS

How adversely these last minute changes will affect authors' rights needs more careful consideration than the delegates could give, and a better knowledge of publishing than many of them possessed. The chairman of the Conference, in his closing remarks, observed that the system of compulsory licenses would not satisfy "the world of authors" in the developed and developing countries. He hoped that compulsory licenses would be an exception, as they had been since 1952. And a principal reassurance offered authors by the architects of the 1971 revisions is that few licenses will be issued. But if that is so, then there is no need to adopt these new provisions which sharply downgrade the level of protection in UCC and Berne. A more realistic forecast may be a substantial increase in compulsory licenses: because the time period for translation is reduced from seven years to one year, or three years; because compulsory reproduction licenses are expressly sanctioned; and because the last minute changes on "outside" translation and printing make compulsory licenses cheap and easy to use.

WHY AUTHORS ARE UNHAPPY

Some architects of the 1971 revisions assume it contains reasonable safeguards for authors. But, as the chairman noted, their views are not likely to satisfy

the "world of authors," and with good reason. First, the architects cite the "limited" purpose of compulsory licenses. But "education," "scholarship" and "systematic instructional activities" have been broadly interpreted in the Report, and by delegates from several developing countries, so there is no real obstacle to the compulsory translation or reproduction of books for sale, in large part, to a general reading audience. Moreover, there is no practical way for an author to stop the improper issuance or misuse of a license.

Second, the architects assume that authors and publishers can prevent compulsory translation licenses by having authorized translations published. But translations cost money to prepare and to publish. And they must be kept in print, since a six-month lapse would still open the door for compulsory licensing. Actually few authors or publishers could afford the expense of issuing translations of a book into several languages as insurance against compulsory licenses. They need some hope of an audience, and market, for the translation; and it is precisely that which the compulsory license system may deny them. The architects also suggest that authors can prevent compulsory licenses by issuing a translation in the six- or nine-month grace period after the request for a license is received. But even assuming translations could be made and published so quickly, this is totally unrealistic. The applicant is not obliged to exercise his compulsory license within a specified time, or to use it at all. Once he gets it, he can just sit with it. Therefore, an author or publisher could not know whether he was spending money for a translation to defeat a compulsory license that never would be used. Furthermore, while publication of an authorized translation, anywhere, would prevent a compulsory translation license for that language, it exposes the translation to a compulsory reproduction license.

If the 1971 UCC comes into effect, American authors and publishers will be faced with these problems for the thousands of works already in print that have not been translated into French, Spanish, Portuguese, or other languages used in developing countries.

CAN AUTHORS PROTECT THEMSELVES?

Third, the architects assume that authors can protect themselves against compulsory reproduction licenses, and terminate translation and reproduction licenses that have been granted, by distributing copies of an authorized edition in the developing country which issued the license. But this requires not only distribution, but distribution at a "price reasonably related" to the price "normally" charged there "for comparable works." Finding a distributor in some countries can itself be a problem. Finding one who will sell an authorized edition in competition with the compulsory-license edition may be more of a problem; even when the license terminates, the backlog can be sold off. The difficulties may multiply where the developing country owns or controls its publishing facilities. Will a state-owned publishing house distribute the author's authorized edition if that terminates its compulsory license to issue the work, or prevents it from obtaining a compulsory reproduction license at a low royalty? Even if the author or publisher can find a distributor, can their authorized edition meet the second requirement; can it be sold at a "price reasonably related to that normally charged" for comparable works, if the comparable works are sold at a narrow mark-up, or at cost, or below cost, by a state-owned or subsidized publisher, or acquired cheaply (or free) from a foreign state under the "outside printing" interpretation?

Fourth, the architects note that a compulsory license cannot be granted until the owner's authorization has been requested and denied. But what choices face the author or publisher who receives a request for authorization to translate or reproduce a work? As noted, he cannot afford to rush a translation into print each time. He can accept, reject, or bargain for better terms than the applicant offers. If the royalty offered him is unsatisfactory, his chances of increasing it by bargaining are as slight as his bargaining power. He is under the gun. If he rejects the royalty offered him, the applicant will receive a compulsory license, with the royalty rate fixed by authorities in the developing country. And with this alternative, it is unlikely that those requesting his authorization will offer him generous terms.

No minimum royalty is specified in the 1971 UCC. It requires only that compensation be "consistent with standards of royalties normally operating in the case of licenses freely negotiated between persons in the two countries concerned." If the author is not satisfied with the rate fixed by the authorities of the developing country, under this broad mandate, he could challenge it only in the courts of the developing country. In fact, all objections to the issuance of licenses would have to be made there. That requires a considerable investment for every license,

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with not too promising a chance of success. The 1971 UCC provides no other forum for authors of publishers aggrieved by their treatment in developing countries.

Even allowing for a substantial discounting of these possible dangers, a compulsory licensing system is a dismal prospect for the "world of authors" in developed and developing countries. It becomes more dismal if several developing countries can issue compulsory licenses for the same work, use one translator to translate it, and have the translation printed in quantity in one plant in another country; or have a large quantity of copies run off in the plant under reproduction licenses issued by all of them. Mass production is possible. And compulsory licensing becomes an even more attractive alternative to voluntary arrangements between the author and developing countries that want to use his work. It also offers some developed countries an inexpensive means of extending aid to underdeveloped countries, *i.e.* printing cheap, mass paperback editions of books by authors from other developed countries. Under the "outside printing" interpretation, each developing country will decide whether its own printing facilities "are incapable for economic or practical reasons of reproducing the copies" of foreign works for which it issues compulsory licenses.

As the chairman of the UCC conference suggested, compulsory licensing should not be the ordinary means of providing for publication in developing countries. It should be the rare exception, used only where voluntary negotiations cannot secure for a developing country the right to publish a book it truly needs for educational purposes, and then with fair compensation for the author. Authors are entitled to ask for a rigorous analysis of the compulsory licensing system created at both Paris conferences, in the texts and by the interpretations, to determine whether it is likely to produce only a few compulsory licenses or to encourage their use as a fundamental means of acquiring translation and publishing rights. For if the latter result develops, authors will, in effect, be compelled to subsidize "developing" countries, including some well able to pay normal royalties. This is a sacrifice not asked of manufacturers of soft drinks, industrial equipment, automobiles or other products—including those purchased by developing countries for the construction or operation of schools. Nor is it a sacrifice likely to be asked of translators who will translate under compulsory licenses, or publishers who will be granted those licenses in developing countries. If subsidies are required to aid education in developing countries, they would more appropriately come from the governments of developed countries, including funds to pay royalties on copies translated or reproduced in developing countries under voluntary licenses.

Ultimately the Senate will have to decide if the United States ratifies the 1971 UCC. If it does not, the United States would remain a party to the 1952 UCC, and the new compulsory licensing provisions would not apply to American works. Moreover, the Paris Act of the Berne Convention would not become effective. Developing countries might leave Berne or the UCC. They would then be free to institute compulsory licensing systems of their own devising, or deny any protection to foreign works. But their works would not be entitled, under the Conventions, to protection in other countries. Retaliation in the long run, if not the short, might persuade them to remain in the UCC or rejoin it.

Ratification would freeze a compulsory license system into both Berne and UCC for decades to come, available to a majority of the members of the U.N. for an unpredictable period of time. When, for example, will Brazil or Yugoslavia or India decide they have become developed countries? If Brazil or Yugoslavia or Israel are still developing countries, how long will it take for less developed developing countries to become developed? These are some of the questions left unanswered by the Paris conferences. And in the shadow of these questions, a careful analysis of the effects and consequences of the two new conventions is imperative, before the Senate decides what action the United States should take.

AMERICAN BAR ASSOCIATION, COMMITTEE ON INTERNATIONAL PATENT, TRADEMARK, AND COPYRIGHT RELATIONS OF THE SECTION ON INTERNATIONAL LAW—COPYRIGHTS, PARIS REVISION OF UNIVERSAL AND BERNE COPYRIGHT CONVENTIONS—JULY 1971

INTRODUCTION

As our last report pointed out, the authors and publishers of the "developed" countries were shocked four years ago when a Revision Conference of the Berne Convention met at Stockholm and adopted a Protocol which was designed to give

the "developing" countries relatively free access to copyrighted works for most purposes (see further details at pages 4–5 of this report). Much to the surprise of the developing countries, none of the leading developed countries adhered to the Stockholm revision and there is no substantial likelihood of their ever doing so.

The United States representatives to the Stockholm Conference made it clear that if the Stockholm Protocol became a fixed part of the Berne Convention it would be impossible for the United States to adhere to Berne at any time in the future. Recognizing that the developing countries are entitled to some assistance in obtaining the right to use foreign works for educational purposes consistent with the principles of international copyright, efforts have been made in the United States and abroad to meet those needs while at the same time preserving the basic structure of international copyright. With this in view, diplomatic conferences to revise both the Universal Copyright Convention (hereafter, UCC) and the Berne Convention for the Protection of Literary and Artistic Works (hereafter, Berne Convention), were scheduled for meetings in Paris last July. At those meetings both Conventions were modified to accomplish substantially the objects set forth in our last report.

THE PARIS CONFERENCES OF JULY 5–24, 1971

Delegations of seventy-five countries participated in three weeks of intensive deliberations at Paris from July 5–24, 1971, to revise the two Conventions. Twenty-six countries, including the United States, signed the revised UCC, and twenty-eight countries signed the revised Berne Convention.

Both Conventions now await ratification by the signatory States,[1] and accession by the non-signatory States in accordance with their constitutional procedures. For the UCC, the appropriate instrument is to be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization (UNESCO). For the Berne Convention, the appropriate instrument is to be deposited with the Director-General of the World Intellectual Property Organization (WIPO).

The United States Delegation to the Paris Conferences was headed by Bruce D. Ladd, Deputy Assistant Secretary of State for Commercial Affairs and Business Activities and Abraham L. Kaminstein, then Register of Copyrights. The advisers to the United States Delegation included three members of the Subcommittee on Patents, Trademarks and Copyrights of the Judiciary Committee of the United States House of Representatives—Robert W. Kastenmeier, Chairman of that Subcommittee and Edward G. Biester, Jr., and Abner J. Mikva, members of the Subcommittee; Herbert Fuchs of the Judiciary Committee Staff, Barbara Ringer and Robert Hadl of the Copyright Office, and Robert Evans, Herman Finkelstein, Sidney Kaye, Irwin Karp, Bella Linden, Melville Nimmer and Sidney Schreiber, members of the State Department Copyright Panel.

ACTION OF THE AMERICAN BAR ASSOCIATION IN 1970—INTER-RELATION OF DOMESTIC AND INTERNATIONAL COPYRIGHT LEGISLATION

Early this year the American Bar Association approved the following resolution adopted by the Association's Section on Patents, Trademarks and Copyright Law in 1970:

"*Resolved*, in order that the United States may participate in a meaningful manner in the diplomatic conferences scheduled for May and June of 1971 for the revision of the Berne and Universal Copyright Conventions and without affecting or withdrawing from the position taken by the Section of Patent, Trademark and Copyright Law in 1965 and by the American Bar Association in 1966, that the Section of Patent, Trademark and Copyright Law favors in principle the prompt enactment of legislation amending The Copyright Law of the United States, Title 17, United States Code, to embody at least the following: (1) A single Federal system of copyright; (2) A basic term consisting of the life of the author, plus fifty years after his death, with an extension of subsisting copyrights, and for works made for hire, the term of seventy-five years from publication; (3) a relaxation of formalities as to notice consistent with reasonable notice and equitable treatment in the case of failure to comply; and (4) No limitation of copyright by way of a manufacturing clause."

[1] The UCC was open for signature until November 21, 1971, by States party to the 1952 text of the Convention. The Berne Convention will remain open for signature until January 31, 1972 by any country member of the Union.

THE STOCKHOLM PROTOCOL OF 1967

The Stockholm Protocol included the following concessions to developing countries, members of the Berne Union: the right to reduce the term of copyright from "life plus fifty years" to "life plus twenty-five years"; to allow compulsory licenses for translation into national, official, or regional languages, if, within three years of first publication, such action had not been taken or authorized by the copyright owner; to allow compulsory licenses for reproduction of works under similar conditions; to limit the exclusive right to broadcast "for profit-making purposes"; and to restrict the protection of literary and artistic works for "teaching, study and research in all fields of education." The possible economic benefits from all of these privileges were further enhanced by exceptionally loose provisions concerning the export of copies made under compulsory licenses and royalty payments.

So much has been written on the subject that detailed comment is not necessary in this report.[2]

CHANGES IN THE UNIVERSAL COPYRIGHT CONVENTION

The only right which the original UCC required member states to safeguard was the right of translation. The Paris Revision provides for additional rights and authorized certain limitations on the right of translation as applied to developing countries.

ARTICLE IV BIS OF THE PARIS REVISION—RIGHTS OF REPRODUCTION, PUBLIC PERFORMANCE AND BROADCASTING

This Article is one of the new articles included in the revised UCC. It is divided into two paragraphs. Paragraph 1 adds the basic rights of reproduction, public performance, and broadcasting. As adopted by the Conference, these basic rights are defined as "exclusive" rights and apply to works protected under the Convention "either in their original form or in any form recognizably derived from the original."

Paragraph 2 provides that any Contracting State may make exceptions to the rights mentioned in paragraph 1 that "do not conflict with the spirit and provisions of this Convention." However, States must "accord a reasonable degree of effective protection to each of the rights to which exception has been made."

One of the fundamental premises of the revised UCC is that no State, now party to the UCC, that respects the fundamental rights of authors should be required to make any changes in its domestic law as a condition for ratifying or adhering to the 1971 text. Thus, "no country now meeting the obligations of the 1952 Convention and according basic copyright protection would be required to assume new obligations in order to adhere to the 1971 Convention" (Report, para. 44). Otherwise ratifications might be delayed and the purpose of the revision Conferences—to meet the immediate needs of developing countries—might be thwarted.

The provision in paragraph 2 permitting exceptions to the specified rights is necessarily couched in terms of broad generality. This provision must allow for the wide variety of exceptions now existing in the laws of many different countries. The United States, for example, recognizes the fairly broad exceptions inherent in the doctrine of fair use, subjects the right of public performance of music to the jukebox exemption and the for-profit limitation, and subjects the recording right in music to a compulsory license. The copyright revision bill (currently S. 644, 92nd Congress) would provide for a number of specific exceptions and limitations on the rights of copyright owners.

The broad provision for exceptions in paragraph 2 has given rise to the argument in some quarters that the specification in paragraph 1 of the basic rights of reproduction, public performance, and broadcasting is rendered meaningless. Your Committee does not agree with that view. Paragraph 2 qualifies its allowance for exceptions by requiring every State to accord "a reasonable degree of effective

[2] Lazar, "Developing Countries and Authors' Rights in International Copyright," *ASCAP Copyright Law Symposium Number Nineteen* 1 (1971); Schrader, "Armageddon in International Copyright: Review of the Berne Convention, the Universal Copyright Convention, and the Present Crisis in International Copyright," 2 *Advances in Librarianship* 306 (1971); Ringer, "The Role of the United States in International Copyright," 56 *Georgetown Law Journal* 1050 (1968); Desbois, "The Diplomatic Conference for the Revision of the Berne and Geneva Conventions," 68 *Revue Internationale Du Droit D'Auteur* 2 (1971); Ulmer, "The Draft Texts for the Revisions of the Copyright Conventions," 125B *European Broadcasting Union Review* 47 (1971); See also Ulmer, *EBU Review*, Nos. 120B, p. 48 and 122B, p. 40.

For a detailed history of the preparatory steps leading to the Protocol, *see* Johnson "The Origins of the Stockholm Protocol," 18 *Bull. Cr. Soc.* 91 (1970); *see also*, Schrader, "Analysis of the Protocol Regarding Developing Countries," 17 *Bull. Cr. Soc.* 160, 161–66 (1970); Ringer, *supra* note 4.

protection to each of the rights to which exception has been made." As stated by the Rapporteur-General, "where exceptions are made, they must have a logical basis and must not be applied arbitrarily, and the protection offered must be effectively enforced by the laws of the Contracting State" (Report, para. 46(4)).

There has been much concern about whether a developed country may, under paragraph 2, institute a "general system of compulsory licensing for the publication of literary, scientific or artistic works" along the lines permitted developing countries under Articles Vter and Vquater. The Report gives assurance to the contrary. Specifically it states that "the inclusion in the Convention of special provisions allowing developing countries to publish certain works and translations under compulsory licenses, means *a contrario* that, except as provided in Article V, there could be no question of developed countries instituting a general system of compulsory licensing for the publication of literary, scientific or artistic works." (Report, para. 46(2)).

ARTICLE VBIS—"DEVELOPING COUNTRIES"

This Article is another new article in the revised UCC. It regulates the procedure for determining which countries are developing countries and the periods during which developing countries may apply the exceptions contained in new Articles Vter and Vquater.

ARTICLE VTER—EXCEPTIONS TO THE RIGHT OF TRANSLATION

The provisions of this Article are new and concern the exceptions that developing countries may make to the right of translation. They are related to Article V which now governs the right of translation for all countries. Under Article V all States must recognize the translation right for a period of seven years from the date of first publication. After that time, and failing publication in a language in general use to the particular country, the translation right may be subjected to a compulsory license, with compensation required, until the term of copyright expires.

Article Vter permits developing countries to substitute for the seven-year period of Article V, the period of three years or longer, where the translation is into a language in general use in one or more developed countries ("world languages"). They may substitute the period of one year where the translation is into a language not in general use in one or more developed countries ("non-world languages"). It was clearly understood at the Conference that English, French and Spanish would be considered "world languages". Thus, a compulsory license to translate into one of these languages in a developing country cannot be considered until at least three years have elapsed from the date of first publication.

In the case of "world languages" other than English, French and Spanish, a special exception is recognized if the developing country where the language is in general use obtains the agreement of all the developed countries speaking the same language. Under these circumstances, the three-year period may be reduced to one year. This special exception was introduced mainly to resolve a difficulty that had arisen with respect to Portuguese and which involved Portugal and Brazil.

Article Vter also contains numerous conditions affecting the ability of developing countries to issue compulsory licenses. First, a compulsory license to publish a translation may only be granted if the applicant establishes either that he has requested and been denied authorization by the owner of the right of translation, or that after due diligence on his part he was unable to find the owner of the right. In addition, at the same time as he makes his request, he must inform the international copyright information center established by UNESCO of the request, or any national or regional information center which may have been designated in a notification to UNESCO by the State in which the publisher is believed to have his principal place of business.

If the owner of the right of translation cannot be found, the applicant must send copies of his application to the publisher whose name appears on the work and to any national or regional information center. If no such center has been designated, he must then send a copy to the UNESCO information center.

Second, in the case of translations into "nonworld languages" there is a further period of nine months, and in the case of "world languages" there is a further period of six months, before the license may issue. These periods run either from the date of the request for permission to translate, or, if the owner of the right of translation is not known, from the date of the dispatch of copies of the application.

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Third, any compulsory license to translate may only be granted for the purpose of teaching, scholarship or research.

Fourth, no copies made under a compulsory license may be exported from the particular developing country, and all copies must bear a notice stating that they are available for distribution only in the Contracting State granting the license. A limited exception to the export ban is recognized in the case where certain developing countries may wish to supply communities of their nationals living in other countries with translations prepared under Article Vter.

Fifth, due provision must be made at the national level to assure that the license provides for just compensation that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned. Payment and transmittal are also required, but if national currency regulations intervene, the competent authority must make all efforts, by the use of international machinery, to ensure transmittal in internationally convertible currency or its equivalent.

Finally, a compulsory license to translate is to be terminated at any time if a translation of the work in the same language and with substantially the same content is published in the country by the owner of the right of translation, or with his permission, at a price reasonably related to that normally charged in the State for comparable works.

Subject to all the above conditions, Article Vter also provides for compulsory licenses to broadcasting organizations in developing countries to translate works in printed or analogous forms of reproduction within the same time periods for use in broadcasts. These broadcasts must be intended exclusively for teaching or for the dissemination of the results of specialized technical or scientific research to experts in a particular profession. All uses of the translation must be without any commercial purpose. Further, the license cannot convey any rights of adaptation, including adaptation of a non-dramatic work to dramatic form, or use in cinematographic works, and it does not of itself sanction the broadcasting of the translation or the making of "ephemeral" or other recordings (Report, para. 85).

The same criteria and conditions apply to the translation by a broadcasting organization of the text incorporated in an audio-visual fixation, if the audio-visual fixation was itself prepared and published for the sole purpose of being used in connection with systematic instructional activities.

ARTICLE VQUATER—COMPULSORY LICENSES TO REPRODUCE WORKS

The provisions of this Article are new and regulate the conditions under which developing countries may reproduce works under compulsory licenses. The scope of the Article is limited to works published in printed or analogous forms of reproduction, but also includes audio-visual works and the translation of any incorporated text, provided the work was prepared and published for the sole intrinsic purpose of being used in connection with systematic instructional activities.

If copies of a particular edition of a work have not been distributed in a particular developing country, to the general public or in connection with systematic instructional activities, at a price reasonably related to that charged in the State for comparable works, by the owner of the right of reproduction or with his authorization, then the competent authority in the developing country may issue a compulsory license to one of its nationals to reproduce and publish the work. The general minimum time period before which a reproduction can be made is five years, although a shorter period of three years is recognized for works of the natural and physical sciences. A longer period of seven years is recognized for works of fiction, poetry, drama, music and art books.

Like Article Vter, Article Vquater also contains numerous conditions affecting the issuance of a compulsory license. The procedure for obtaining a compulsory license is essentially the same: the prospective licensee must have made efforts in good faith to negotiate a license or to find the owner of the right. In all cases the license is restricted to use in connection with systematic instructional activities. In addition, the export ban and royalty payment provisions of Article Vter are applicable to reproductions. Further the compulsory license is to be terminated if the owner of the right of reproduction or his authorized representative distributes in the particular country, copies of an edition substantially the same in content as the edition published under the license and at a price reasonably related to that normally charged in the country for comparable works.

Article Vquater also contains a special provision concerning the ability of developing countries to issue a compulsory license to reproduce a translation of a

work. Such licenses may only be granted where the reproduction is of a translation published by the owner of the right of translation or with his authorization, and where the translation is in a language in general use in the State with power to grant the license.

ARTICLE IX—RELATION BETWEEN STATES NOT ADHERING TO PARIS REVISION AND STATES THAT ADHERE TO REVISION

Paragraphs 3 and 4 of Article IX are new. They attempt to regulate the problem posed by the fact that once the revised Convention enters into force, the UCC will exist in two versions and that some States may only be a party to one of these two versions.

As a first step in solving the problem, paragraph 3 provides that any State that becomes a party to the revised Convention and that is not a party to the 1952 Convention, automatically becomes a party to the 1952 Convention. Furthermore, once the revised Convention comes into force, no State may accede solely to the 1952 Convention. In this way, new members and old members (whether or not the old members have ratified or adhered to the new text) are assured of having a common text between them—the 1952 Convention.

Paragraph 4 then provides that relations between States party to the 1971 Convention and States that are party only to the 1952 Convention are governed by the 1952 Convention. However, any State party only to the 1952 Convention may, by a notification deposited with UNESCO, state that it will permit the application of the 1971 Convention to works of its nationals or works first published in its territory, by all States party to the 1971 Convention. For the United States this means that until such time as it ratifies the revised Convention or deposits a notification in accordance with paragraph 4, no developing country may avail itself of the special exceptions for such countries contained in the 1971 Convention as against works of nationals of the United States or works first published in the United States.

Article XVII and the Appendix Declaration contain the so-called "Berne safeguard clause". Under paragraph (a) of the Appendix Declaration, works which have as their country of origin a country that has withdrawn from the Berne Union will not be given protection under the UCC in other Berne countries. Under new paragraph (b) a developing country may now withdraw from the Berne Convention and not be subject to the sanctions contained in paragraph (a).

BERNE CONVENTION

1. Separation of Stockholm Protocol from Berne Convention. The Conference decided that the best method of separating the Stockholm Protocol from the Berne Convention was to draft an entirely new text of the Berne Convention. Under this new text, known as the Paris Act, Articles 1–20 and 22–26 of the Stockholm Act were repeated verbatim. The Protocol was replaced by new reservations for developing countries contained in an "Appendix" that forms an integral part of the Convention (Article 21).

2. Adherence by France, Spain, United Kingdom and United States to Revised UCC as Conditions for Revision of Berne. The developing countries insisted that the Stockholm Protocol remain intact unless the major developed countries accepted the special concessions for developing countries in the new text of the UCC. They wanted some assurance that the Stockholm experience would not be repeated.

As adopted by the Conference, the Paris Act of the Berne Convention will only enter force after both of the following two conditions are fulfilled: (1) at least five countries members of the Berne Union have ratified or acceded to the Paris Act including the Appendix, and (2) France, Spain, the United Kingdom and the United States have become bound by the revised text of the UCC.

The inclusion of the United States, a non-Berne country, in the group of four developed countries whose ratification of the UCC is a condition precedent for the entry into force of the Berne revision, caused much discussion at the Conference. In effect, the failure of the United States to ratify the revised text of the UCC will operate as a veto of the revised Berne text. Some Berne countries felt that a non-Berne country should not have this power. The developing countries, however, maintained the position taken in the Washington Recommendation to include the United States as one of the four countries.

3. Appendix to Berne Union adopted in place of Stockholm Protocol. The "Appendix" to the Paris Act forms an integral part of the Berne Convention.

Article I of the Appendix corresponds to Article Vbis of the UCC. It establishes the criteria for determining "developing country" status, governs the duration of the reservations, loss of developing country status, and applicability to territories. It provides that the special privileges are open to developing countries whether or not they are presently members of the Berne Union. In the preparatory meetings the United States supported such an open-ended provision to preserve the balance between the Berne Convention and the UCC and to assure the orderly future development of the Berne Convention.

Article II of the Appendix corresponds to Article Vter of the UCC on translations and Article III of the Appendix corresponds to Article Vquater of the UCC on reproductions.

Article IV of the Appendix groups together the provisions relating to the formalities and conditions for obtaining licenses that are common to the translation and reproduction reservations.

Article V of the Appendix adds the special option for the ten-year translation system of the existing Berne Convention.

Article VI of the Appendix has no counterpart in the UCC. It provides for the early applicability of the reservations and is similar to Article 5 of the Stockholm Protocol.

There are several major points of divergence between the Berne Convention and the UCC in their treatment of the provisions for developing countries.

One major difference relates to the term of copyright. During the preparatory meetings for revision of the Berne Convention, the developing countries abandoned their demand for a reduction in the copyright term. Consequently, there is no special provision for developing countries in the Berne Convention on this subject. The usual Berne system of life of the author plus fifty years will apply, whereas in the UCC the term for developed and developing countries is essentially life plus twenty-five years or twenty-five years from first publication.

Another principal difference between the UCC and Berne Convention concerns the translation reservation. Under the Berne Convention, there is an exclusive right of translation for the full term of copyright, but certain countries, already members of the Union, may restrict the right to a priod of ten years. If no translation is made in the particular country within ten years, the work may be translated without payment or other conditions attached. This restriction to the right of translation may also be elected by new members who adhere to the Berne Convention, but in either case, it is subject to material reciprocity (that is, the possibility that other countries may similarly lower the level of protection they give to works of the country in question).

In attempting to reconcile the ten-year system with the new system of compulsory licensing provided in Article II of the Appendix, the Conference adopted a provision whereby developing countries would be given an irrevocable choice between the ten-year system and the compulsory licensing system. For a developing country that opts for the ten-year system, the provision on material reciprocity will not apply.

The practical consequences of this scheme for the United States are two-fold. First, it is doubtful whether many developing countries will choose the ten-year system because of their immediate needs for current educational and instructional materials. This will probably mean that most developing countries that are members of the Berne Convention or that become members of Berne in the future will choose the compulsory licensing system provided in Article II of the Appendix.

Second, the Berne scheme will continue to encourage simultaneous publication of United States works in Berne countries. Under the Berne scheme, any United States work simultaneously published in a Berne country will enjoy, even in those developing countries members of the Berne Convention that have adopted compulsory licensing provisions, the benefits of the Berne provisions for the duration of copyright. Such a work will not be subject to the more liberal licensing provisions possible in the UCC under Article V after the seven-year period has expired.

INTERPRETATION OF PROHIBITION AGAINST EXPORT

During one of the meetings of the Main Commission of the Berne Convention, a proposal was put forward by four African States, to permit developing countries having a common language to obtain a joint compulsory license for translation or reproduction. When the proposal was discussed, it became apparent that a fundamental question was whether the holder of a compulsory license could have copies of the work printed in another country. Since these problems were common to

both the UCC and the Berne Convention, a Joint Working Group of the two Conventions was created. As a result, both Conferences agreed that an interpretation should be included in the report of each Conference. It may be summarized as follows (Report, paras. 114–115):

The prohibition against export applies equally to printing outside the territory of the State granting the compulsory license except if the following conditions are met: the licensee State does not have printing or reproduction facilities, or its facilities "are incapable for economic or practical reasons of reproducing the copies"; the copies are reproduced in a Berne or UCC country; they are returned in bulk to the licensee; the reproduction is lawful where done; and it is not done in a plant especially created for reproducing works covered by compulsory licenses. The interpretation also states that Articles Vter and Vquater of the new UCC and the comparable Berne provisions do not prohibit a compulsory licensee from employing a foreign translator, or several licensees in different countries from using the same translation, assuming, of course, that the translation has not already been published.

Your Committee believes that there is a general public interest in preserving the structure of international copyright and in the availability, encouragement, protection and interchange of intellectural creations of all nations. Those who would discount the probable impairment of the international copyright structure by the non-ratification of the United States appear to us to run grave risks.

Your Committee takes the view that the present situation in international copyright cannot be viewed in a vacuum, but must take account of the Stockholm Conference and the efforts of the past four years to bring order from the chaos produced by the Stockholm Protocol. We believe that the present revisions of the UCC and the Berne Convention are substantial improvements over the provisions contained in the Stockholm Protocol.

We also believe that the danger posed for international copyright by the Stockholm failure was a real one and that another failure may have the effect of encouraging many developing countries to denounce one or both Conventions.

CONCLUSION

The members of your Committee approve, in principle, the Universal Copyright Convention and the Berne Convention as revised in Paris on July 24, 1971. Appreciating that there had to be some compromises and obviously some ambiguities, and considering the difficult task of seventy-five nations reaching agreement upon two highly technical instruments by way of open debate in various languages on each phrase, your Committee is of the view that, on balance, the Paris Conference achieved a notable result of meeting the needs of developing countries while preserving the structure and basic protection of international copyright.

Accordingly, your Committee recommends adoption of the following resolution for submission to the House of Delegates at the mid-Winter meeting to be held in New Orleans in February, 1972:

> *Resolved*, That the American Bar Association endorses the ratification by the United States of the Universal Copyright Convention as revised at Paris on July 24, 1971, and that the Section of International and Comparative Law and the Section of Patent, Trademark and Copyright Law are authorized to present the position of the Association in this matter before Congress.

The Committee wishes to express its appreciation to Robert Hadl of the Copyright Office for a draft report prepared by him which has largely served as a basis for the preparation of this report and the report of Committee 302 of the Patent, Trademark and Copyright Section. The use of Mr. Hadl's draft in preparation of the report of both committees will facilitate a joint presentation of the attached resolution to the House of Delegates.

RESOLUTION

Resolved, That the American Bar Association endorses the ratification by the United States of the Universal Copyright Convention as revised at Paris on July 24, 1971, and that the Section of International and Comparative Law and the Section of Patent, Trademark and Copyright Law are authorized to present the position of the Association in this matter before Congress.

Section of Patent, Trademark and Copyright Law

Report of committee no. 302—international copyright treaties and laws

Scope of Committee.—Problems arising out of differences in the copyright laws of various countries. Specifically the fields of major concern at the present time are: (1) the right of United States citizens to obtain copyright in other countries, the right of foreign authors to obtain copyright in the United States; (2) the laws of foreign countries relative to the rights of exportation and importation of copyrighted works, the laws of the United States relative to the rights of exportation and importation of copyrighted works; (3) the several conventions and treaties involving copyright; and (4) the protection afforded copyright works of United States citizens under the local laws of the various foreign countries.

This committee cooperates with other Sections and Committees of the A.B.A. such as the Section of International and Comparative Law, where opportunity permits.

Subject 2. Universal Copyright Convention, as Revised, 1971

no proposed resolution

Past Action.—At the Mid-Winter meeting of the Section at Rancho Bernardo, California, the Section, taking action on a special report submitted by this committee, adopted the following resolution, as recommended:

Resolved, That the Section of Patent, Trademark and Copyright Law endorses the ratification by the United States of the Universal Copyright Convention as revised at Paris on July 24, 1971.

Thereafter, at the Mid-Winter meeting at New Orleans of the House of Delegates, acting upon a joint report of the Section together with the Section of International and Comparative Law, the Association adopted the following resolution:

Resolved, That the American Bar Association endorses the ratification by the United States of the Universal Copyright Convention as revised at Paris on July 24, 1971, and that the Section of International and Comparative Law and the Section of Patent, Trademark and Copyright Law are authorized to present the position of the Association in this matter before Congress.

On March 15, 1972 the President of the United States transmitted to the Senate, with a view of receiving its advice and consent to ratification, the revised Universal Copyright Convention, together with a report of the Acting Secretary of State in which it was noted that "Favorable action on the Convention has been taken by the American Bar Association." (Senate Executive G, 92nd Cong., 2nd Sess.)

Discussion.—There are set forth below the special report of Committee 302, presented to the Section at its Mid-Winter meeting, and the joint report of the Section with the Section of International and Comparative Law, presented to the House of Delegates at the Mid-Winter meeting at New Orleans.

Respectfully submitted.

Sidney Schreiber, *Chairman.*
Saul N. Rittenberg, *Co-Chairman.*

Members Approving the Report:

Angelo F. Addona
Robert Asti
Joseph W. Bailey
Harry Buchman
Richard Colby
Heinz Dawid
Dixon Q. Dern
Joseph S. Dubin
Albert H. Dwyer
William H. Dyczko
Zachary S. Flax
Michael H. Gerber
Robert D. Hadl
Stephen A. Kahn
Ernest S. Meyers
Stephens Mitchell
Paul B. Morofsky
Kelsey M. Mott
Maxwell Okun
Robert Pincus
Saul N. Rittenberg
Adolph Schimel
Sidney Schreiber
Bernard R. Sorkin
Edward S. Yambrusic [1]

[1] Approves "in principle."

Special Report of Committee 302 (Presented to the Section at its Midwinter Meeting)

Proposed Resolution

Resolved, That the Section of Patent, Trademark and Copyright Law endorses the ratification by the United States of the Universal Copyright Convention as revised at Paris on July 24, 1971.

Past Action.—In 1954 the Association, in amendment of a Resolution adopted by the Section in 1953, adopted the following Resolution:

Resolved, That the American Bar Association endorses the ratification by the United States of the Universal Copyright Convention signed at Geneva, Switzerland on the 6th day of September 1952, with such implementing legislation to be enacted by the Congress of the United States prior to depositing the United States instrument of ratification as will effectuate the purposes of the Convention; and That the Section of International and Comparative Law and the Section of Patent, Trademark and Copyright Law are authorized to present the position of this Association in this matter before the Congress.

In 1968 the Section adopted a Resolution (1968S.P.86), the text of which is set forth subsequently herein (see p. 172).

In February, 1971 the Association approved a Resolution adopted by the Section at the Annual Meeting in St. Louis (1970S.P.101), the text of which is set forth subsequently herein (see p. 173).

No Resolution presented here is inconsistent with any existing action of the Section.

Introduction

Delegations of seventy-five countries participated in three weeks of intensive deliberations at Paris from July 5–24, 1971, to revise the Universal Copyright Convention (hereafter, UCC) and the Berne Convention for the Protection of Literary and Artistic Works (hereinafter, Berne Convention). Twenty-six countries, including the United States, signed the revised UCC, and twenty-eight countries signed the revised Berne Convention.

Both Conventions now await ratification by the signatory States,[1] and accession by the non-signatory States in accordance with their constitutional procedures. For the UCC, the appropriate instrument is to be deposited with the Director-General of the United Nations Educational, Scientific and Cultural Organization (UNESCO). For the Berne Convention, the appropriate instrument is to be deposited with the Director-General of the World Intellectual Property Organization (WIPO).

On September 17, 1971, Abraham L. Kaminstein, Register of Copyrights, and Bruce C. Ladd, Jr., Deputy Assistant Secretary of State for Commercial Affairs and Business Activities, Co-Chairman of the United States Delegation to the Paris Conference, submitted their report to the Secretary of State.

At the time of the preparation of this special report by your Committee, the revised UCC has not yet been submitted by President Nixon for ratification by the United States Senate.

The revised UCC is not self-executing. It requires each Contracting State to be in a position under its domestic law to give effect to the term of the Convention at the time its instrument of ratification, acceptance or accession is deposited (Article X). However, it does not appear that the changes made in the 1952 Convention will require any change in the domestic legislation of the United States before ratification may take place.[2] Accordingly, enabling legislation is not envisaged.

It is the view of your Committee that this special report should serve: (1) to give the background leading to the Paris Conferences; (2) to analyze the revised Conventions for the Section; and (3) to evaluate the impact of the revised Conventions on United States interests, including on the information thus far available to the Committee, the advantages for the United States claimed by the revised Conventions as well as such criticisms as may have come to the Committee's attention.

In general, the members of your Committee approve the revision of the UCC and the revision of the Berne Convention adopted in Paris on July 24, 1971. Considering the difficult tasks facing the revision Conferences, the highly charged

[1] The UCC will remain open for signature until November 21, 1971, by States party to the 1952 text of the Convention. The Berne Convention will remain open for signature until January 31, 1972 by any country member of the Union.

[2] See the discussion *infra*, under heading "Universal Copyright Convention—Article IV*bis*"

controversy between developing and developed countries generated by the Stockholm Protocol of 1967, and the necessity of reconciling delicate technical questions in the three languages among delegates representing over half of the nations of the world, it is remarkable that any agreement was reached at all. Obviously there had to be some compromises and some ambiguities. On balance, your Committee is of the view that the Conferences were successful in finding a solution to the difficult problem of meeting the needs of developing countries and of preserving the structure and basic protection of international copyright. For these reasons, your Committee believes that it is in the interest of the United States to be a party to the revised UCC as adopted at Paris on July 24, 1971.

BACKGROUND

Extensive documentation is available on the background leading to the Paris Conferences. This includes reports prepared by UNESCO and WIPO as part of the preconference series of documents [3] as well as articles in journals appearing in the United States [4] and around the world.[5] No analysis of the Paris Conferences and the results achieved, however, can be made without some knowledge of the Stockholm Conference of 1967 and its aftermath. Accordingly, your Committee offers the following summary of the events leading to the Paris Conferences to help place in proper perspective the international copyright situation as it existed on the eve of the Paris Conferences.

International copyright was plunged into crisis in 1967 at the Stockholm Intellectual Property Conference. One of the objectives of this Conference was the revision of the Berne Convention, including special provisions for the benefit of developing countries. These provisions were annexed to the draft text of the Convention as a Protocol Regarding Developing Countries (hereafter, "Protocol," or "Stockhom Protocol").[6] During the Conference, however, the developing countrie were able to obtain much greater concessions than those proposed in the draft text. As a result, the final text of the Protocol adopted by the Conference gave developing countries very broad and virtually uncontrolled privileges with respect to works copyrighted in Berne Union countries.[7]

Shortly after the Stockholm Conference, it became apparent that an impasse had developed between the developed and developing countries that threatened to destroy the structure of international copyright. Under the Stockholm Act of the Berne Convention no developed country could be bound by the Protocol unless it formally agreed to accept it. Following Stockholm, no developed country except Sweden accepted the Protocol.

Faced with this refusal by the developed countries to accept the Stockholm Protocol, the developing countries had several options. They could denounce their international copyright obligations completely by withdrawing from the UCC and the Berne Convention, or they could attempt to alter their membership in the two Conventions by resigning from one but maintaining their membership in the other. At this point, the existence of two different copyright conventions with different levels of production and a large overlap in membership added complexities to the crisis produced by the Stockholm Protocol.

The UCC, to which the United States is a party, is characterized by the principle of national treatment, but even if a country's domestic legislation provides for relatively low-level protection, it can still belong to the UCC. The Berne

[3] INLA/UCC 4; B/DC/3 and B/DC/4.

[4] Lazar, "Developing Countries and Authors' Rights in International Copyright," *ASCAP Copyright Law Symposium Number Nineteen* 1 (1971); Schrader, "Armageddon in International Copyright: Review of the Berne Convention, the Universal Copyright Convention, and the Present Crisis in International Copyright," 2 *Advances in Librarianship* 306 (1971); Ringer, "The Role of the United States in International Copyright," 56 *Georgetown Law Journal* 1050 (1968).

[5] Desbois, "The Diplomatic Conference for the Revision of the Berne and Geneva Conventions," 68 *Revue Internationale Du Droit D'Auteur* 2 (1971); Ulmer, "The Draft Texts for the Revisions of the Copyright Conventions," 125B *European Broadcasting Union Review* 47 (1971); See also, Ulmer *EBU Review*, Nos. 120B, p. 48 and 122B, p. 40.

[6] For a detailed history of the preparatory steps leading to the Protocol, *see* Johnson, "The Origins of the Stockholm Protocol," 18 *Bull. Cr. Soc.* 91 (1970); See also, Schrader, "Analysis of the Protocol Regarding Developing Countries," 17 *Bull. Cr. Soc.* 180, 161-66 (1970); Ringer, *supra* note 4.

[7] The privileges won by "developing countries" included the right to reduce the term of copyright from "life plus fifty years" to "life plus twenty-five years"; to allow compulsory licenses for translation into national, official, or regional languages, if, within three years of first publication, such action had not been taken or authorized by the copyright owner; to allow compulsory licenses for reproduction of works under similar conditions; to limit the exclusive right to broadcast "for profit-making purposes", and to restrict the protection of literary and artistic works for "teaching, study and research in all fields of education." The possible economic benefits from all of these privileges were further enhanced by exceptionally loose provisions concerning the export of copies made under compulsory licenses and royalty payments.

Convention, in addition to requiring national treatment, requires its parties to provide a specified minimum of copyright protection for other Berne works in their domestic legislation. The standards set by the minimum provide a high level of copyright protection.

The situation is complicated by the fact that the original Berne Convention of 1886 has been revised a number of times and there are, as a result, several different "Berne texts", each providing for different standards of protection. Protection in Berne Convention countries will vary depending upon which text the particular country has accepted. Moreover, some of the texts permit reservations on particular points, and others do not. In addition, the UCC contains the so-called "Berne safeguard clause"—Article XVII and its Appendix Declaration—, a provision prohibiting a Berne Convention country from denouncing Berne and relying on the UCC for protection of its works in other Berne Union countries. Thus, under this clause, a country resigning from the Berne Union but remaining in the UCC would continue to have obligations under the UCC, but would have no protection for its own works in other Berne Union countries under either Convention.[8]

Under these circumstances, the developing countries wishing to alter their membership by leaving the Berne Convention for the lower level UCC were frustrated by the existence of the "Berne safeguard clause". To remove this obstacle, they submitted a proposal designed to suspend the sanctions imposed by the "Berne safeguard clause" for developing countries.[9]

It was against this background that the Register of Copyrights announced to a meeting of the governing bodies of the UCC and the Berne Convention in December, 1967, that it would be impossible for the United States to join the Berne Convention if it had to accept the Stockholm Protocol, and that he viewed with very great concern the confusion and erosion in standards of international copyright protection resulting from the Stockholm Conference. He urged that the representatives of both developed and developing countries join together to study the whole international copyright situation, including practical ways of meeting the needs of developing countries.[10]

The program outlined by the Register was accepted in 1969 by the governing bodies of the two Conventions. They agreed to establish an International Copyright Joint Study Group, and, upon the invitation of the United States, agreed that the Joint Study Group would meet in Washington in September, 1969.

In 1968, in response to the Register's statement, and in anticipation of the meeting of the Joint Study Group, the Section adopted the following resolution (1968S.P.85):

Resolved, That the Section of Patent, Trademark and Copyright Law approves the position with respect to uses of copyrighted works by developing countries as stated by the Register of Copyrights at the meeting of the Intergovernmental Copyright Committee of the Universal Copyright Convention in Geneva in December 1967.

Specifically, the Section approves the decision of the Intergovernmental Copyright Committee and the Berne Permanent Committee to set up a joint study group to analyze the relationship of the two Conventions (Berne Convention and Universal Copyright Convention) and any revisions of the substantive provisions of the UCC with the understanding that both groups are planning to determine the real needs of developing countries, and to consider how best these needs can be met without injuring adequate and effective copyright protection.

At the meeting of the Joint Study Group, a proposal to end the international copyright crisis was presented and adopted. Dubbed the "Washington Recommendation",[11] this proposal called for the simultaneous revision of both the UCC and the Berne Convention to achieve the following objectives:

(1) In the UCC the level of protection would be improved by the specification of certain minimum rights. These would include the rights of reproduction, public performance, and broadcasting. At the same time, special provisions would be included in the UCC for the benefit of developing countries. Finally, the "Berne safeguard clause" would be suspended to permit developing countries to leave the Berne Convention without penalty under the UCC.

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[8] For a general discussion of the "Berne safeguard clause" *see* Mott, "The Relationship Between the Berne Convention and the Universal Copyright Convention," 11 IDEA 306, 309-25 (1967).

[9] Tunisia and France were sponsors of a resolution adopted for this purpose. *See* UNESCO Res. No. 5.122 reprinted in 3 *Copyright* 72 (1967) *See also* Ringer, *supra* note 4 at 1068-69; Johnson *supra* note 6 at 18.

[10] "Statement by the Register for the United States Delegation at Geneva," 15 *Bull. Cr. Soc.* 157 (1968).

[11] "International Copyright Joint Study Group," 5 *Copyright* 214, 227 (1969). The Study Group also adopted a report urging the establishment within UNESCO of an Information Center to assist the developing countries in acquiring desired information with respect to the ownership, availability and process for obtaining reprint or translation rights on copyrighted material. *Id* at 226-27. The new Information Center commenced operation in January, 1971.

(2) In the Berne Convention, the Protocol would be separated from the Stockholm Act and, in turn, the developing countries would be able to substitute the special provisions included for their benefit in the UCC. This would mean that the developing countries could remain in the Berne Convention and would not be forced to exercise the option provided by the suspension of the "Berne safeguard clause". As a protective measure for the developing countries, it was provided that the Stockholm Protocol could not be separated from the Stockholm text until such time as France, Spain, the United Kingdom and the United States had ratified the revised text of the UCC.[12] Furthermore, developing countries would be relieved of the obligation to pay assessments to the Berne Union if they continued their membership after the new revision.[13]

The Washington Recommendation won the general support of all the countries that attended the meeting of the Joint Study Group.[14] The question for the meetings that followed was whether it could be successfully implemented.

As contrasted with the trend represented by the Stockholm Protocol, the meetings following the Joint Study Group saw the developing countries abandon several important demands. These included the privileges respecting the term of copyright, the "for profit" limitation on the right of broadcasting, and the broad right to restrict the protection of literary and artistic works for "teaching, study and research in all fields of education". Thus, on the eve of the Paris Conferences, the special privileges for developing countries had been limited to compulsory licenses for translation and reproduction.

During all these preliminary stages, your Committee was kept fully informed of developments and was invited to assist and cooperate with the Government. A number of members of your Committee, as well as its Chairman, were members of a special panel constituted by the Department of State to follow developments in international copyright and to assist the Government in its continuing study and review of the matter. In addition, other members of government agencies, individuals selected from various industries and groups, and bar association committees concerned with copyright participated in the work of the panel.

The United States Delegation to the Paris Conferences included representative of the State Department, Commerce Department and Copyright Office, as well as three Congressional advisers: Honorable Robert W. Kastenmeier, Chairman of the Subcommittee of the House Judiciary Committee that deals with copyright; Edward G. Biester, Jr., member of the same Subcommittee; and Abner J. Mikva, also a member of the Subcommittee. Herbert Fuchs, member of the staff of the Judiciary Committee, also attended.

Other advisers to the delegation were: Robert Evans, Herman Finkelstein, Sidney Kaye, Irwin Karp, Bella Linden, Melville Nimmer and Sidney Schreiber, all of whom have been most active in copyright activities and are members of the Section of Patent, Trademark and Copyright Law.

To make clear its position concerning the Paris Conferences, the Association, just prior to their commencement, approved the following resolution adopted by the Section in 1970:

Resolved, in order that the United States may participate in a meaningful manner in the diplomatic conferences scheduled for May and June of 1971 for the revision of the Berne and Universal Copyright Conventions and without affecting or withdrawing from the position taken by the Section of Patent, Trademark and Copyright Law in 1965 and by the American Bar Association in 1966, that the Section of Patent, Trademark and Copyright Law favors in principle the prompt enactment of legislation amending The Copyright Law of the United States, Title 17, United States Code, to embody at least the following: (1) A single Federal system of copyright; (2) A basic term consisting of the life of the author, plus fifty years after his death, with an extension of subsisting copyrights, and for works made for hire, the term of seventy-five years from publication; (3) A relaxation of formalities as to notice consistent with reasonable notice and equitable treatment in the case of failure to comply; and (4) No limitation of copyright by way of a manufacturing clause.

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[12] The purpose of this recommendation was to make ratification of or accession to the revised text of the UCC (containing the new concessions for developing countries) by the four named countries the *quid pro quo* for separation of the Stockholm Protocol from the Berne Convention.

[13] This recommendation was included largely upon the initiative of the Berne Secretariat. It was abandoned in May 1970, when it became apparent that some developed countries believed that it would be grounds for limiting the voting rights of developing countries in the Berne Union.

[14] France reserved its position on two parts of the proposal.

PARIS CONFERENCES

This special report cannot begin to match the very thorough, illuminating and highly praised account of the UCC Conference contained in the report of the Rapporteur-General, Abraham L. Kaminstein, Register of Copyrights and Co-Chairman of the United States Delegation. Mr. Kaminstein's report, to which Miss Barbara A. Ringer, Assistant Register of Copyrights and Alternate Delegate of the United States Delegation, gave invaluable assistance, appears as Annex A to this document (hereafter, Report). The summary minutes of the proceedings in the plenary sessions and the Main Commission will be published at a later date.

In reviewing the text of the revised Conventions, your Committee believes that it should direct its attention to those articles that have the greatest impact on the United States.

UNIVERSAL COPYRIGHT CONVENTION

ARTICLE IVBIS

This Article is one of the new articles of the revised UCC. Paragraph 1 embodies the proposal contained in the Washington Recommendation to add the basic rights of reproduction, public performance, and broadcasting to the UCC. As adopted by the Conference, these basic rights are defined as "exclusive" rights and apply to works protected under the Convention "either in their original form or in any form recognizably derived from the original."

Paragraph 2 provides that any Contracting State may make exceptions to the rights mentioned in paragraph 1 that "do not conflict with the spirit and provisions of this Convention." However, States must "accord a reasonable degree of effective protection to each of the rights to which exception has been made."

One of the fundamental premises of the revised UCC is that no State, now party to the UCC, that respects the fundamental rights of authors should be required to make any changes in its domestic law as a condition for ratifying or adhering to the 1971 text. Thus, "no country now meeting the obligations of the 1952 Convention and according basic copyright protection would be required to assume new obligations in order to adhere to the 1971 Convention" (Report, para. 44). Otherwise ratifications might be delayed and the purpose of the revision Conferences—to meet the immediate needs of developing countries—might be thwarted.

The provision in paragraph 2 permitting exceptions to the specified rights is necessarily couched in terms of broad generality. This provision must allow for the wide variety of exceptions, mostly of relatively minor significance, now existing in the laws of many different countries. The United States, for example, recognizes the fairly broad exceptions inherent in the doctrine of fair use, subjects the right of public performance of music to the jukebox exemption and the for-profit limitations, and subjects the recording right in music to a compulsory license. The copyright revision bill (currently S. 644, 92nd Congress) would provide for a number of specific exceptions and limitations on the rights of copyright owners.

The broad provision for exceptions in paragraph 2 has given rise to the argument in some quarters that the specification in paragraph 1 of the basic rights of reproduction, public performance, and broadcasting is rendered meaningless. Your Committee does not agree with that view. Paragraph 2 qualifies the provision for exceptions by requiring every State to accord "a reasonable degree of effective protection to each of the rights to which exception has been made." As stated by the Rapporteur-General, "where exceptions are made, they must have a logical basis and must not be applied arbitrarily, and the protection offered must be effectively enforced by the laws of the Contracting State" (Report, para. 46(4)).

A second fundamental premise embodied in Article IV*bis* is the "a contrario principle". It concerns the relation between the exceptions contained in paragraph 2 and the special exceptions for developing countries contained in Articles *Vter* and *Vquater*. Its effect is that no developed country may, under paragraph 2, institute a "general system of compulsory licensing for the publication of literary, scientific or artistic works" along the lines permitted developing countries under Article *Vter* and *Vquater*. It is understood that the phrase "general system" means either "a system applying to a specific type of work with respect to all forms of uses, or to a system applying to all types of works with respect to a particular form of use" (Report, para. 46(2)). It should be noted that the prohibition applies

to the "publication of literary, scientific, or artistic works" and does not affect limitations which might be imposed on the rights of public performance or broadcasting.

In light of the broad description of the term "general system" your Committee does not view any of the present proposals for limitations on exclusive rights contained in the proposed revision of the United States copyright law (S. 644, 92nd Cong., 1st Sess.) as inconsistent with or barred by the provisions of the revised Convention.

ARTICLE VBIS

This Article is another new article in the revised UCC. It regulates the procedure for determining which countries are developing countries and the periods during which developing countries may apply the exceptions contained in new Articles *Vter* and *Vquater*. The definition of a developing country is the same as that used in the Stockholm Protocol ("Any contracting State that is regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations * * *) but, unlike the Protocol, the exceptions are limited to successive periods of ten years each. In addition, developing countries need not indicate their intention to avail themselves of praticular exceptions at the time of ratification or accession, but may make such notification at a subsequent time. Further, the ten year period is uniform for all States and runs from the date of entry into force of the revised Convention.

While the formula for determining those countries that may be considered developing countries was accepted without much discussion, the Rapporteur-General was asked to formulate his views on the question. When the matter arose at the final plenary session, the views of the Rapporteur-General proved too controversial to be considered as the views of the Conference. They are appended, however, as a personal statement to his report and, in view of your Committee, represent a reasoned approach to the criteria for determining a "developing country". He concluded: * * * the best criterion is that of United Nations assessments based on per capita income, but it cannot be applied automatically. In doubtful or borderline cases, United Nations aid can also be considered, and there may be a few special cases where the only realistic ceritria are those of common sense and world opinion.

ARTICLE VTER

The provisions of this Article are new and concern the exceptions that developing countries may make to the right of translation. They are related to Article V which now governs the right of translation for all countries. Under Article V all States must recognize the translation right for a period of seven years from the date of first publication. After that time, and failing publication in a language in general use of the particular country, the translation right may be subjected to a compulsory license, with compensation required, until the term of copyright expires.

Article *Vter* permits developing countries to substitute for the seven-year period of Article V, the period of three years or longer, where the translation is into a language in general use in one or more developed countries, ("world languages"). They may substitute the period of one year where the translation is into a language not in general use in one or more developed countries ("non-world languages"). It was clearly understood at the Conference that English, French and Spanish would be considered "world languages". Thus, a compulsory license to translate into one of these languages in a developing country cannot be considered until at least three years have elapsed from the date of first publication.

In the case of "world languages" other than English, French and Spanish, a special exception is recognized if the developing country where the language is in general use obtains the agreement of all the developed countries speaking the same language. Under these circumstances, the three-year period may be reduced to one year. This special exception was introduced mainly to resolve a difficulty that had arisen with respect to Portuguese and which involved Portugal and Brazil.

Article *Vter* also contains numerous conditions affecting the ability of developing countries to issue compulsory licenses. First, a compulsory license to publish a translation may only be granted if the applicant establishes either that he has requested and been denied authorization by the owner of the right of translation, or that after due diligence on his part he was unable to find the owner of the right. In addition, at the same time as he makes his request, he must inform the international copyright information center established by UNESCO of the request,

or any national or regional information center which may have been designated in a notification to UNESCO by the State in which the publisher is believed to have his principal place of business.

If the owner of the right of translation cannot be found, the applicant must send copies of his application to the publisher whose name appears on the work and to any national or regional information center. If no such center has been designated, he must then send a copy to the UNESCO information center.

Second, in the case of translations into "non-world languages" there is a further period of nine months, and in the case of "world languages" there is a further period of six months, before the license may issue. These periods run either from the date of the request for permission to translate, or, if the owner of the right of translation is not known, from the date of the dispatch of copies of the application.

Third, any compulsory license to translate may be granted only for the purpose of teaching, scholarship or research.

Fourth, no copies made under a compulsory license may be exported from the developing country, and all copies must bear a notice stating that they are available for distribution only in the Contracting State granting the license. A limited exception to the export ban is recognized in the case where certain developing countries may wish to supply communities of their nationals living in other countries with translations prepared under Article *Vter*.

Fifth, due provision must be made at the national level to assure that the license provides for just compensation that is consistent with standards of royalties normally operating on licenses freely negotiated between persons in the two countries concerned. Payment and transmittal are also required, but if national currency regulations intervene, the competent authority must make all efforts by the use of international machinery, to ensure transmittal in internationally convertible currency or its equivalent.

Finally, a compulsory license to translate is to be terminated at any time if a translation of the work in the same language and with substantially the same content is published in the country by the owner of the right of translation, or with his permission, at a price reasonably related to that normally charged in the State for comparable works.

Subject to all the above conditions, Article *Vter* also provides for compulsory licenses to broadcasting organizations in developing countries to translate works in printed or analogous forms of reproduction within the same time periods for use in broadcasts. These broadcasts must be intended exclusively for teaching or for the dissemination of the results of specialized technical or scientific research to experts in a particular profession. All uses of the translation must be without any commercial purpose. Further, the license cannot convey any rights of adaptation, including adaptation of a non-dramatic work to dramatic form, or use in cinematographic works, and it does not of itself sanction the broadcasting of the translation or the making of "ephemeral" or other recordings (Report, para. 86).

The same criteria and conditions apply to the translation by a broadcasting organization of the text incorporated in an audio-visual fixation, if the audio-visual fixation was itself prepared and published for the sole purpose of being used in connection with systematic instructional activities.

ARTICLE VQUATER

The provisions of this Article are new and regulate the conditions under which developing countries may reproduce works under compulsory licenses. The scope of the Article is limited to works published in printed or analogous forms of reproduction, but also includes audio-visual works and the translation of any incorporated text, provided the work was prepared and published for the sole intrinsic purpose of being used in connection with systematic instructional activities.

If copies of a particular edition of a work have not been distributed in a particular diveloping county, to the general public or in connection with systematic instructional activities, at a price reasonably related to that charged in the State for comparable works, by the owner of the right of reproduction or with his authorization, then the competent authority in the developing country may issue a compulsory license to one of its nationals to reproduce and publish the work. The general minimum time period before which a reproduction can be made is five years, although a shorter period of three years is recognized for works of the natural and physical sciences. A longer period of seven years is recognized for works of fiction, poetry, drama, music and art books.

Like Article *Vter*, Article *Vquater* also contains numerous conditions affecting the issuance of a compulsory license. The procedure for obtaining a compulsory license is essentially the same: the prospective licensee must have made efforts in good faith to negotiate a license or to find the owner of the right. In all cases the license is restricted to use in connection with systematic instructional activities. In addition, the export ban and royalty payment provisions of Article *Vter* are applicable to reproductions. Further the compulsory license is to be terminated if the owner of the right of reproduction or his authorized representative distributes in the particular country, copies of an edition substantially the same in content as the edition published under the license and at a price reasonably related to that normally charged in the country for comparable works.

Article *Vquater* also contains a special provision concerning the ability of developing countries to issue a compulsory license to reproduce a translation of a work. Such licenses may only be granted where the reproduction is of a translation published by the owner of the right of translation or with his authorization, and where the translation is in a language in general use in the State with power to grant the license.

ARTICLE IX

Paragraphs 3 and 4 of Article IX are new. They attempt to regulate the problem posed by the fact that once the revised Convention enters into force, the UCC will exist in two versions and that some States may only be a party to one of these two versions.

As a first step in solving the problem paragraph 3 provides that any State that becomes a party to the revised Convention and that is not a party to the 1952 Convention, automatically becomes a party to the 1952 Convention. Furthermore, once the revised Convention comes into force, no State may accede solely to the 1952 Convention. In this way, new members and old members (whether or not the old members have ratified or adhered to the new text) are assured of having a common text between them—the 1952 Convention.

Paragraph 4 then provides that relations between States party to the 1971 Convention and States that are party only to the 1952 Convention are governed by the 1952 Convention. However, any State party only to the 1952 Convention may, by a notification deposited with UNESCO, state that it will permit the application of the 1971 Convention to works of its nationals or works first published in its territory, by all States party to the 1971 Convention. For the United States this means that until such time as it ratifies the revised Convention or deposits a notification in accordance with paragraph 4, no developing country may avail itself of the special exceptions for such countries contained in the 1971 Convention as against works of nationals of the United States or works first published in the United States.

Article XVII and the Appendix Declaration contain the so-called "Berne safeguard clause". Under paragraph (a) of the Appendix Declaration, works which have as their country of origin a country that has withdrawn from the Berne Union will not be given protection under the UCC in other Berne countries. Under new paragraph (b) a developing country may now withdraw from the Berne Convention and not be subject to the sanctions contained in paragraph (a).

While this suspension of the "Berne safeguard clause" in favor of developing countries was the focal point for the early efforts to revise the UCC, the Washington Recommendation offered developing countries substantially the same concessions in the Berne Convention as under the UCC. For these reasons, your Committee believes that developing countries will have no need to avail themselves of the opportunity which the suspension provides and will remain members of both the Berne Convention and the UCC.

BERNE CONVENTION

The three points of the Washington Recommendation relating to the Berne Convention were all implemented at the Paris Conference.

The first point of the Washington Recommendation was to separate the Stockholm Protocal from the main text of the Stockholm Act of the Berne Convention. The Conference decided that the best method of achieving this objective was to draft an entirely new text of the Berne Convention. Under this new text, known as the Paris Act, Articles 1-20 and 22-26 of the Stockholm Act were repeated verbatim. The Protocol was replaced by new reservations for developing countries contained in an "Appendix" that forms an integral part of the Convention (Article 21).

The second point of the Washington Recommendation was to condition the entry into force of the revised Berne Convention upon the ratification of, or accession to, or acceptance of the new text of the UCC by France, Spain, the United Kingdom, and the United States. The reason for this proposal was to provide the developing countries with some guarantee that the major developed countries would accept the special concessions for developing countries in the new texts before the Protocol was eliminated. They wanted some assurance that the Stockholm experience would not be repeated.

As adopted by the Conference, the Paris Act of the Berne Convention will only enter into force after both of the following two conditions are fulfilled: (1) at least five countries members of the Berne Union have ratified or acceded to the Paris Act including the Appendix, and (2) France, Spain, the United Kingdom and the United States have become bound by the revised text of the UCC.

The inclusion of the United States, a non-Berne country, in the group of four developed countries whose ratification of the UCC is a condition precedent for the entry into force of the Berne revision, caused much discussion at the Conference. In effect, the failure of the United States to ratify the revised text of the UCC will operate as a veto of the revised Berne text. Some Berne countries felt that a non-Berne country should not have this power. The developing countries, however, maintained the position taken in the Washington Recommendation to include the United States as one of the four countries.

The third point of the Washington Recommendation gave developing countries the option of remaining in the Berne Convention and, at the same time, applying the exceptions that would be included in the revised UCC. Because of opposition from France, this recommendation was modified during the preparatory meetings by eliminating the reference in the Berne Convention to the exceptions detailed in the UCC. Instead, the same concessions for developing countries as had been agreed upon for the revision of the UCC were specified in Berne. These concessions are included in a new "Appendix" to the Paris Act that forms an integral part of the Convention. A brief analysis of the Appendix follows.

Article I of the Appendix corresponds to Article *Vbis* of the UCC. It establishes the criteria for determining "developing country" status, governs the duration of the reservations, loss of developing country status, and applicability to territories. It provides that the special privileges are open to developing countries whether or not they are presently members of the Berne Union. In the preparatory meetings the United States supported such an open-ended provision to preserve the balance between the Berne Convention and the UCC and to assure the orderly future development of the Berne Convention.

Article II of the Appendix corresponds to Article *Vter* of the UCC on translations and Article III of the Appendix corresponds to Article *Vquater* of the UCC on reproductions.

Article IV of the Appendix groups together the provisions relating to the formalities and conditions for obtaining licenses that are common to the translation and reproduction reservations.

Article V of the Appendix adds the special option for the ten-year translation system of the existing Berne Convention.

Article VI of the Appendix has no counterpart in the UCC. It provides for the early applicability of the reservations and is similar to Article 5 of the Stockholm Protocol.

There are several major points of divergence between the Berne Convention and the UCC in their treatment of the provisions for developing countries.

One major difference relates to the term of copyright. During the preparatory meetings for revision of the Berne Convention, the developing countries abandoned their demand for a reduction in the copyright term. Consequently, there is no special provision for developing countries in the Berne Convention on this subject. The usual Berne system of life of the author plus fifty years will apply, whereas in the UCC the term for developed and developing countries is essentially life plus twenty-five years or twenty-five years from first publication.

Another principal difference between the UCC and the Berne Convention concerns the translation reservation. Under the Berne Convention, there is an exclusive right of translation for the full term of copyright, but certain countries, already members of the Union, may restrict the right to a period of ten years. If no translation is made in the particular country within ten years, the work may be translated without payment or other conditions attached. This restriction to the right of translation may also be elected by new members who adhere to the Berne Convention, but in either case, it is subject to material reciprocity (that is, the possibility that other countries may similarly lower the level of protection they give to works of the country in question).

In attempting to reconcile the ten-year system with the new system of compulsory licensing provided in Article II of the Appendix, the Conference adopted a provision whereby developing countries would be given an irrevocable choice between the ten-year system and the compulsory licensing system. For a developing country that opts for the ten-year system, the provision on material reciprocity will not apply.

The practical consequences of this scheme for the United States are two-fold. First, it is doubtful whether many developing countries will choose the ten-year system because of their immediate needs for current educational and instructional materials. This will probably mean that most developing countries that are members of the Berne Convention or that become members of Berne in the future will choose the compulsory licensing system provided in Article II of the Appendix.

Second, the Berne scheme will continue to encourage simultaneous publication of United States works in Berne countries. Under the Berne scheme, any United States work simultaneously published in a Berne country will enjoy, even in those developing countries members of the Berne Convention that have adopted compulsory licensing provisions, the benefits of the Berne provisions for the duration of copyright. Such a work will not be subject to the more liberal licensing provisions possible in the UCC under Article V after the seven-year period has expired.

INTERPRETATION OF PROHIBITION AGAINST EXPORT

During one of the meetings of the Main Commission of the Berne Convention, a proposal was put forward by four African States, to permit developing countries having a common language to obtain a joint compulsory license for translation or reproduction. When the proposal was discussed, it became apparent that a fundamental question was whether the holder of a compulsory license could have copies of the work printed in another country. Since these problems were common to both the UCC and the Berne Convention, a Joint Working Group of the two Conventions were created. As a result, both Conferences agreed that an interpretation should be included in the report of each Conference. It may be summarized as follows (Report, paras. 115–116):

The prohibition against export applies equally to printing outside the territory of the State granting the compulsory license except if the following conditions are met: the licensee State does not have printing or reproduction facilities, or its facilities "are incapable for economic or practical reasons of reproducing the copies"; the copies are reproduced in a Berne or UCC country; they are returned in bulk to the licensee; the reproduction is lawful where done; and it is not done in a plant especially created for reproducing works covered by compulsory licenses. The interpretation also states that Articles *Vter* and *Vquater* of the new UCC and the comparable Berne provisions do not prohibit a compulsory licensee from employing a foreign translator, or several licensees in different countries from using the same translation, assuming, of course, that the translation has not already been published.

IMPACT ON UNITED STATES INTERESTS

If the United States ratifies the revised text of the Universal Copyright Convention, the principal impact on United States authors and copyright owners will be in the dissemination and marketing of their works in developing countries. Your Committee does not believe that the revised Convention will have any significant impact on the dissemination and marketing of works within the United States. The reasons are twofold.

First, as previously indicated, one of the fundamental premises of the revised UCC is that no State now party to the UCC that respects the fundamental rights of authors is required to make any changes in its domestic law as a condition for ratifying or adhering to the 1971 text. Since the present copyright law of the United States does respect the fundamental rights of authors, no change is required in domestic law before ratification may take place. Thus, the present domestic position of owners and users of copyrighted works will not be changed by the revised Convention.

Second, while the revised UCC allows special exceptions for developing countries, and thereby implies that developed countries may not create similar exceptions for users of copyrighted works in their domestic laws, the Conference was careful to stipulate that such an implied prohibition only applies to a 'general system of compulsory licensing for the publication of literary, scientific or artistic works" along the lines permitted developing countries under Articles *Vter* and *Vquater* (Report, para. 46 (2)).

Your Committee believes that this implied prohibition would not prevent the adoption of any proposal now pending regarding restrictions on the rights of copyright owners contained in the current bill for revision of the copyright law of the United States (S. 644, 92nd Cong., 1st Sess.). Your Committee also believes that the prohibition would not prevent the consideration of future proposals for legislation that would be consistent with a reasonable balance between the rights of copyright owners and limitations on those rights to facilitate dissemination and use of copyrighted work. In any event, it should be noted that the prohibition is applicable to works of foreign origin and would not necessarily prevent a different standard from being imposed on works of domestic origin.

In view of the above considerations, your Committee believes that the principal impact of the revised UCC on United States authors and copyright owners is in the dissemination and marketing of their works in developing countries. It is not surprising, therefore, that such criticism as your Committee has thus far encountered is directed toward the economic impact on the marketing of United States works in developing countries that may result if the revised Conventions enter into force. For example, it is argued that the revised Conventions give developing countries virtually unrestricted powers with respect to the use of works created by United States authors, and that the safeguards contained in the revised Conventions are too vague and general to be meaningful. It is also argued that a refusal by the United States to ratify the revised UCC will not result in a breakdown in international copyright relations and that developing countries will remain members of both the UCC and the Berne Convention.

Your Committee does not share these views. Our analysis of the provisions of the revised Conventions convinces us that the procedural and substantive restrictions on the issuance of compulsory licenses are substantial, and, under the circumstances, reasonably protect the interests of United States citizens. We also believe that developing countries will honor their international treaty obligations and will apply the compulsory license provisions correctly and with a view toward the spirit underlying their enactment. Of course, if the contrary proves to be true, the United States would not be powerless to take countervailing measures.

Moreover, the history of compulsory licensing provisions, both domestic and international, demonstrates that their effect often is to encourage the negotiation of voluntary agreements by the parties. Such agreements, containing their own terms and conditions, would not suffer from any of the infirmities allegedly seen under the revised Conventions.

Even assuming, however, that compulsory licenses may become prevalent if the revised Conventions enter into force, your Committee does not believe that they will have a seriously adverse economic impact on the United States authors and copyright owners. In our view, developing countries represent largely undeveloped markets for the sale of works created by United States citizens, and the careful cultivation of these markets will ultimately inure to the benefit of the United States and other developed countries. Even if a reduction in potential royalties may result in some instances, such reductions must be weighed against the total royalties from developing countries that may be projected in the future as the markets expand or the greater loss that would invariably result if developing countries do not remain members of the UCC and the Berne Convention.

In any event, apart from the economic interest of United States authors and copyright owners in the revised Conventions, your Committee believes that there is a general public interest in preserving the structure of international copyright and in the availability, encouragement, protection and interchange of intellectual creations of all nations. Those who would discount the probable impairment of the international copyright structure as a result of non-ratification by the United States appear to us unjustifiably optimistic.

Your Committee takes the view that the present situation in international copyright cannot be viewed in a vacuum, but must take account of the Stockholm Conference and the efforts of the past four years to bring order from the chaos produced by the Stockholm Protocol. We believe that the present revisions of the UCC and the Berne Convention are substantial improvements over the provisions contained in the Stockholm Protocol.

We also believe that the danger posed for international copyright by the Stockholm failure was a real one and that another failure may have the effect of encouraging many developing countries to denounce one or both Conventions. We do not think it is an answer to suggest that the fear of retaliation against authors in developing countries will deter the governments of those countries from taking such action. To the contrary, if authors' groups in developing countries have enough power to prevent their countries' withdrawal from international

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copyright conventions, they clearly have enough power to prevent the excessive or unfair use of compulsory licensing systems envisaged by the revised Conventions. Those developing countries that restrict the rights of authors in implementing the provisions of the Conventions in their domestic laws must, under the principle of national treatment, apply the same restrictions to their own nationals.

Finally, non-ratification of the revised UCC will bar the coming into force of the revised Berne Convention. Following the Stockholm failure, we believe that this result would adversely affect the orderly future development of the Berne Convention and, particularly, the ability of the Convention to attract new members. The history of the Berne Convention has demonstrated its salutary effect on raising the standards of copyright protection around the world. In our view, this role will be greatly diminished if the Paris Act does not enter into force. Further, if the Berne Convention were to lose its world-wide appeal, or if it were to become a Convention restricted, as a practical matter, to developed countries, the possibility of the United States joining the Convention, should that be deemed to be desirable, might be adversely affected.

CONCLUSION

For the foregoing reasons, your Committee approves, in principle, the Universal Copyright Convention and the Berne Convention as revised in Paris on July 24, 1971. Appreciating that there had to be some compromises and obviously some ambiguities, and considering the difficult task of seventy-five nations reaching agreement upon two highly technical instruments by way of open debate in various languages on each phrase, your Committee is of the view that, on balance, the Paris Conference achieved a notable result of meeting the needs of developing countries while preserving the structure and basic protection of international copyright.

Accordingly, your Committee recommends that the Council take favorable action on the recommendation proposed and that the same recommendation be submitted to the House of Delegates for approval at the Mid-Winter meeting to be held in February 1972.

Respectfully submitted.

SIDNEY SCHREIBER, *Chairman.*
SAUL N. RITTENBERG, *Co-Chairman.*

Members approving Report:

ANGELO F. ADDONA
ROBERT ASTI
JOSEPH W. BAILEY
HARRY BUCHMAN
RICHARD COLBY
DIXON Q. DERN
JOSEPH S. DUBIN [1]
ALBERT H. DWYER
WILLIAM H. DYCZKO
ZACHARY S. FLAX
MICHAEL H. GERBER
ROBERT D. HADL
HEINZ DAWID
STEPHEN A. KAHN
CHARLES H. LIEB
ERNEST S. MEYERS
STEPHENS MITCHELL
PAUL B. MOROFSKY
KELSEY M. MOTT
MAXWELL OKUN
ROBERT PINCUS
SAUL N. RITTENBERG
ADOLPH SCHIMEL
SIDNEY SCHREIBER
BERNARD R. SORKIN

Members disapproving Report:
EDWARD S. YAMBRUSIC

JOINT REPORT OF SECTION OF INTERNATIONAL AND COMPARATIVE LAW AND SECTION OF PATENT, TRADEMARK AND COPYRIGHT LAW

RECOMMENDATION

The Section of International and Comparative Law and the Section of Patent, Trademark and Copyright Law jointly recommend adoption of the following resolution by the American Bar Association:

Resolved, That the American Bar Association endorses the ratification by the United States of the Universal Copyright Convention as revised at Paris on July 24, 1971, and that the Section of International and Comparative Law and

[1] Mr. Dubin states that his approval of ratification of the revised Convention is in principle and should not be taken to extend to each element of the Convention.

the Section of Patent, Trademark and Copyright Law are authorized to present the position of the Association in this matter before Congress.

REPORT

There are two basic conventions that govern International Copyright relations: the Universal Copyright Convention (UCC) to which the United States has been a party since 1954 and the older Berne Convention (Berne) to which the United States has not thus far adhered. The two conventions have been independent of each other except that when the UCC was formulated in 1952 it was agreed that it was not to be used to undermine Berne. In order to insure this, Article 17 of the UCC provided that the works of a country that has withdrawn from Berne will not be given protection under the UCC in other Berne countries. Thus a member of Berne may not leave that convention and rely upon the UCC to govern its international copyright relations. This is called the Berne Safeguard Clause and was adopted to insure the continuing high level of copyright protection under the Berne Convention as contrasted with the UCC which, until the Paris revision, had no minimum requirements except recognition of the right of translation and a relatively short term of copyright.

At the Stockholm Conference to revise the Berne Convention in 1967, the developing countries were successful in a drive to enable them, within the framework of Berne, to use copyrighted works originating primarily in the developed countries without payment when such uses were for educational or cultural purposes. This modification of the Berne Convention has become known as the "Stockholm Protocol".[1] Much to the surprise of the proponents of the Protocol, the Stockholm revision of the Berne Convention was not ratified by the leading members of Berne whose works they intended to use, namely France, Spain and the United Kingdom. The only developed country which had ratified Stockholm was Sweden (the host to the Stockholm Conference) whose works were of little interest to the developing countries.

As a result of the failure of the Stockholm Protocol, the developing countires engaged in a move to revise the UCC in two respects: (1) by eliminating the Berne Safeguard Clause and (2) by transferring the Stockholm Protocol for all practical purposes from the Berne Convention to the UCC. If this move were successful, the developing countries would give up their membership in Berne and American works would in effect be subject to confiscation in the developing countires when used for education or cultural purposes.

In order to find some method of satisfying the legitimate needs of developing countries and at the same time maintaining the integrity of the international copyright system, committees representing Berne and the UCC worked together with the very active cooperation of the United States to find a basis for revising both conventions at conferences to be held in Paris in July 1971.

Those conferences were concluded on July 24, 1971, with revisions of the UCC and Berne that resulted in an agreed accommodation between the developed and developing countries. In addition, certain basic minimum rights were added to the UCC which originally provided only for the right of translation. The Paris Revision changes the UCC in the following respects:

1. The Berne Safeguard Clause is preserved for *development* countries but *developing* countries may now withdraw from Berne without suffering any penalty.

2. The rights of reproduction, public performance and broadcasting are added to the right of translation as basic rights to be recognized in countries adhering to UCC. This will not require a change in our existing law. As the report accompanying the convention points out, "No country now meeting the obligations of the 1952 convention and according basic copyright protection would be required to assume new obligations in adhering to the 1971 convention" (Report, para. 44).

3. Certain exceptions to the right of translation are introduced in favor of developing countries. Compulsory licenses are permitted where a translation in the developing country's language is not available.

4. In addition to compulsory licenses for *translations*, developing countries are permitted to authorize the *reproduction* of works on a compulsory license basis if copies of a particular edition of a work have not been distributed in the country to the general public or in connection with systematic instructional activities. At

[1] The implications and repercussions of the Stockholm Protocol are analyzed in Lazar, "Developing Countries and Authors' Rights in International Copyright," *ASCAP Copyright Law Symposium Number Nineteen* 1 (1971); Schrader, "Armageddon in International Copyright: Review of the Berne Convention, the Universal Copyright Convention, and the Present Crisis in International Copyright," 2 *Advances in Librarianship* 306 (1971); Ringer, "The Role of the United States in International Copyright," 56 *Georgetown Law Journal* 1050 (1968).

least three years must elapse before such a license may be issued in the case of works in the natural and physical sciences; the period applied to works of fiction, poetry, drama, music and art books, however, is longer—seven years. For other works it is five years.

Turning to the Paris revision of *Berne*, although the United States is not a party to that Convention, the United States is directly involved because the Paris revision of Berne does not become operative unless the United States, France, Spain and the United Kingdom adhere to the Paris revision of the UCC. Consequently, if the United States does not adhere to the UCC Revision the latest Berne Revision will be the one signed at Stockholm in 1967 which includes the troublesome Protocol. If this happens the basic purpose of the Paris Revision of both conventions will have been defeated.

Although the United States is not a party to the Berne Convention our scientific, literary and musical works are protected throughout most foreign markets under that Convention. We are an exporting country in these fields and our works secure Berne protection by simultaneous publication in Canada or another Berne country. It is hoped that when our domestic law is revised we will be in a position to join the Berne Convention (with some slight modifications in that convention) or that we may foster a merger of the two conventions. This will not be possible if the Stockholm Protocol remains a part of the Berne Convention because not only the United States but countries such as the United Kingdom, France and Spain, among others, will not adhere to the Stockholm revision of Berne so long as it contains the Protocol.

In the interest of advancing the cause of copyright throughout the world, the revisions of the UCC and Berne should become a reality. This is very much in the interest of the United States.

Accordingly, we urge that the American Bar Association adopt a resolution endorsing ratification by the United States of the UCC as revised at Paris on July 24, 1971.

Respectfully submitted.

HARRY A. INMAN,
Chairman, Section of International and Comparative Law.

DONALD W. BANNER,
Chairman, Section of Patent, Trademark and Copyright Law.

FEBRUARY, 1972.

PASKUS, GORDON & HYMAN,
New York, N.Y., June 2, 1972.

MEMORANDUM

Re CCM and Harcourt Brace opposition to ratification of Paris UCC Treaty.

Mr. ROBERT L. BERNSTEIN.
Mr. SANFORD COBB.

Bella Linden's memorandum, copies of which were circulated by Bob Frase on March 27, has apparently been submitted to the Senate Foreign Relations Committee in support of CCM and Harcourt Brace opposition to ratification. The memorandum is two-pronged. It opposes ratification as "expropriation of the private property of American citizens without adequate compensation," and suggests that in the event of ratification, Congress should provide for compensation to the authors and publishers who would be adversely affected.

AS TO "EXPROPRIATION"

1. In all important respects except one, the Treaty follows the lines of the United States proposals which were adopted at the 1969 Berne and UCC Committee meetings and at the Washington Joint Study Group meeting with the active support of American publishers and others interested in international copyright.

The one principal difference lies in the interpretation of prohibitions against publication and distribution of compulsory licensed works outside of the territory for which the compulsory license has been granted. Generally speaking, the prohibition against extra-territorial activity will not apply if the developing country in question either has no printing or reproducing facilities within its own territory or if its facilities are inadequate for economic or practical reasons.

Mrs. Linden fears that groups of developing countries might combine to utilize the same foreign translation and printing facilities to produce American works and

thereby pre-empt by collusion markets which American authors and publishers would otherwise enjoy.

These limited extra-territorial rights do present problems. They could reduce the cost of production and it is theoretically possible, as Mrs. Linden suggests, that certain developing countries may decide to act in concert to violate the spirit of the Treaty.

However, these factors are offset by the following considerations:

(*a*) The Treaty provides for the settlement of disputes by the International Court of Justice unless another forum is agreed upon and it already has been suggested that WIPO and UNESCO establish a Commission of Appeal for this purpose.

(*b*) There is no reason to believe that developing nations, with the capability to do so, will not want to locally produce the works for which they grant compulsory licenses.

(*c*) Mrs. Linden complains that the developing nations will themselves interpret and enforce the Treaty and that it is doubtful their views will coincide with those of the developed countries. The appellate procedure referred to above, if established, would be the forum to which appeal could be made in any such instance. More importantly, however, by the very nature of the existing systems of national copyright protection, American authors' and publishers' rights depend today upon the fair enforcement by local authorities of their local copyright law, and the Paris Treaty makes no change in this respect.

(*d*) Even more basic, however, is the underlying dilemma that if the United States does not ratify the Treaty which it sponsored, developing nations may withdraw from the international conventions and, in effect, go it alone, refusing to recognize foreign copyright whenever they believe their interests so require. Mrs. Linden does not discuss this point presumably because she believes that developing nations are bluffing and will not withdraw. This is not the judgment, however, of either the State Department or of the Copyright Office or of international experts such as Professor Ulmer of the Max Planck Institut, nor is it the judgment of those who have followed international copyright within AAP and within the British and continental publishing associations.

AS TO GOVERNMENT COMPENSATION

2. Mrs. Linden suggests that if the Treaty is to be ratified, compensation to authors and publishers who might be adversely affected should be provided for under legislation modelled along the lines of the trade Extension Act of 1962. This would not seem appropriate, at least at the present time, for the following reasons:

(*a*) Assuming immediate United States ratification, the first compulsory licenses are not likely to be granted for some time. Only then can it be determined if American publishers and authors are being injured and if they are, that would be the time to determine what action, if any, should be taken to prevent further injury.

(*b*) Government assistance to publishers and authors who claim to be injured might lead to censorship standards for the determination of works eligible for such assistance. A program such as this might in the long run be more harmful than beneficial.

CONCLUSION

Ratification of the Paris Treaty will strengthen and not dilute international copyright protection. AAP supported the State Department and the Copyright Office in bringing about the drafting and signature of the Treaty and the State Department did not forward the Treaty to the Senate for ratification until it first knew that ratification had been approved by AAP, the American Bar Association and by other associations representing the copyright community. It would be inappropriate and inadvisable for AAP to now take any action inconsistent with its prior approval.

[From International Copyright, Nov. 8, 1971]

INTERNATIONAL COPYRIGHT TURNS ANOTHER CORNER

(By Barbara Ringer)

Miss Ringer is Assistant Register of Copyrights and was alternate delegate of the United States to the Paris Conferences. The views

expressed are personal with the author, and do not reflect official Government policy.

On Bastille Day, July 14, 1967, a depressed and nervous group of delegates attended the final ceremony of the Stockholm Intellectual Property Conference to sign, or watch others sign, the text of the newest revision of the Berne Copyright Convention, The jittery, gloomy atmosphere at the Swedish Ministry of Justice was caused by one thing: the now-famous Stockholm Protocol Regarding Developing Countries. The compromises incorporated in the Protocol had been achieved at the last moment and with the utmost difficulty, after five weeks of private acrimony and bitter public forensics, but the problems of the conference were not the reason for the prevailing anxiety. Whether from developing or developed countries, everyone was wondering the same things. Would the Protocol come into effect? If so, how seriously would copyright protection throughout the world be undermined? If not, would it mean the distinegration of the Berne Union and massive piracy in developing countries?

As it happened, the fourth anniversary of that unhappy Saturday occurred in the middle of twin diplomatic conferences, held in Paris in July, 1971, for the basic purpose of undoing the mistakes of Stockholm. No one mentioned the painful anniversary, and Bastille Day, 1971, was notable mainly for the novelty of seeing a few women marching in the French military parade. Ten days later, revised texts of the Berne and Universal Copyright Conventions were signed at UNESCO House in a general atmosphere of good will and optimism. The locomotive that had been derailed at Stockholm was hauled back onto track at Paris and, while somewhat battered, is now in running condition.

A profoundly serious crisis can cause amnesia, and there does appear to be some tendency deliberately to forget or ignore the situation created by the Stockholm Protocol and its aftermath, and to pretend that we are dealing with international copyright as it existed in the late 1940s and early 1950s. Although this attitude can perhaps be attributed to wishful thinking or the demands of advocacy, it is wrong and it is dangerous to the interests of American authors, publishers, and copyright owners generally.

Let no one be misled: the new Paris Copyright Conventions have successfully overcome the crisis brought on by the Stockholm Protocol. They have strengthened rather than weakened international copyright protection; and they have laid the groundwork for a truly worldwide system of protection that should eventually include the more than sixty countries now outside any multilateral copyright treaty. To have brought this about in four years is not a negligible accomplishment, and perhaps even more important for the [illegible]e is the genuine spirit of cooperation and good will built up during those f[illegible]r years and prevailing at the Paris Conferences.

The minutes of the Stockholm Conference, which have recently been published, bear out this writer's personal observations of the course of events. The developing countries were well-organized, fiercely committed to a definite program, and were supported to varying degrees by some developed countries. The only program of the major developed countries was unorganized negativism; the tactics such as they were, involved a great deal of lip-service to the educational needs and fiscal problems of the developing countries, together with unqualified though irresolute opposition to the specific proposals for concessions under the Berne Convention. The lack of organized leadership and definite counterproposals put the developed countries in the position of opposing everything, thus pushing the developing countries to make broader and broader demands. In a highly charged political atmosphere, the developed countries were forced to retreat from entrenched position to entrenched position, and at the end of the conference the developing countries had, in fact, gained more on paper than they had originally sought. The lessons to be drawn from this catastrophe were not lost upon delegates from countries in various stages of development.

POST-STOCKHOLM REACTION

For a number of months after Stockholm, however, the general feeling in the developing countries was a curious combination of angry frustration and helpless resignation. The excesses of the Protocol were deplored, but at the same time it was assumed that sooner or later the Protocol would come into effect and attract a substantial number of ratifications. As time went on, it became apparent that an impasse was developing, and that this was almost as dangerous to international copyright protection as the Protocol itself.

Various proposals for breaking the stalemate were advanced, but for the most part they involved either full acceptance of the Protocol or deliberately driving the developing countries out of the Berne Union. In this writer's opinion, the most significant proposal was that of Abraham L. Kaminstein, the U.S. Register of Copyrights. At a meeting in December, 1967, he said in effect: "Let us admit that the Stockholm Protocol was a mistake and that some countries, including the United States, will not ratify it. Rather than cursing the gods or each other, let us join together to adopt a positive program aimed at meeting the needs of developing countries without endangering the rights of authors. Let us start at once by convening a conference to study the whole problem and to recommend solutions." With many ups and downs along the way, this is precisely what was done: a Joint Study Group met in Washington in September, 1969, and produced the "Washington Recommendation," a compromise proposal that is the cornerstone of the 1971 Paris Conventions.

Following the Washington meeting, there was a further series of preparatory meetings at short intervals, and these produced additional compromises, refinements, and draft texts. These texts, which were the basic working documents of the two Paris Conferences (one for revision of the Universal Convention and the other mainly for revision of the Stockholm Protocol), were reasonably simple considering the formidable subject matter. They embodied compromises on both sides, but no objective observer of the entire preparatory process can fail to see that the developing countries yielded to the developed countries on a number of points. The developed countries were satisfied with the texts as they emerged from the last preparatory meeting, and their effort was to preserve as much as possible of the "package deal" (as it was called *ad nauseam*). Realistic veterans of earlier diplomatic conferences in the intellectual property field knew well, however, that changes were certain to be made to them the goal was to preserve the framework and fundamentals of the compromise in the face of proposals for change by delegates from countries not represented during the earlier preparatory work.

In the opinion of this writer, the basic goal was fully achieved. In its essentials the "package deal" held together, and the changes from the draft texts, while mainly favoring the developing countries, were not of fundamental importance. If there are reasons for regret as to the outcome of the Paris Conferences, they stem, first, from the complicated drafting forced on the delegates by the exigencies of time, and second, from the demand to include special provisions dealing with matters other than translation and reproduction of text matter (*e.g.* audiovisual fixations; translation for educational broadcasting). The awakening of representatives of developing countries to the possibility of skipping entirely over the use of textbooks and going directly to audiovisual procedures in the development of some of their educational systems made special provisions dealing with the latter nearly inevitable by the time of the 1971 conferences. Even so, these special provisions are so carefully circumscribed that they cannot be regarded as a serious departure from the earlier compromise.

IMPACT FOR THE U.S.

In trying to grasp what happened at Paris, one must compare three things: (1) the situation before the Stockholm Protocol in 1967; (2) the Protocol and its relation to the Universal Convention; and (3) the Paris revisions of both the Berne and Universal Conventions. Then, in evaluating what the position of the United States Government on the Paris Conventions should be, we should try to make a more detailed analysis of their provisions, considering their impact if the United States ratifies the revised U.C.C. and if it does not. This sounds formidable, and it is, but what follows will attempt to present the salient points as simply, clearly, and accurately as possible.

The highwater mark in international copyright protection so far was the Brussels text of the Berne Convention, adopted in 1948 and widely ratified among developed and transitional nations, as well as some former colonial dependencies. Even at Brussels, the impact of the new technology, specifically broadcasting media, made itself felt in limitations on protection, but on the whole the philosophy behind the Brussels text was "the more required protection the better." The Universal Copyright Convention of 1952 was quite a different matter: Its modest purpose was to get the United States and other non-Berne members into a multilateral convention on terms they could accept. This mainly involved concessions by U.C.C. countries with respect to the formalities required for protection of

foreign works, the most notorious of which was the manufacturing clause. In the area of exclusive rights, the Universal Convention's only minimum requirement was that the copyright owner have the control over the right to translate his work into another language for seven years, after which the right was subject to compulsory licensing.

In the mid-1960s, the Berne and Universal Copyright Conventions both had about 50 members, with a substantial overlap. The United States will be unable to consider joining the Berne Union until we change our domestic law or the Union lowers its standards, neither a particularly strong bet in the immediate future. Another big power, Soviet Russia, has never belonged to a multilateral copyright convention.

Meanwhile, beginning in the mid-1950s, country after country gained independence from colonial authority of one sort or another. Some of these new states joined the Berne Union, others adhered to the U.C.C., but the majority has yet to take either plunge. As the newly-independent governments came to grips with the problems of illiteracy, scientific and technical instruction, and currency exchange, they began to feel the pinch of their copyright obligations. Those developing countries that are members of the Berne Union mounted an all-out effort to obtain concessions in their favor at the Stockholm Conference in 1967. At the same time, as either an adjunct or alternative to this approach, it was proposed that the Universal Convention be amended to allow developing countries that are members of the Berne Union to leave the Union and still rely fully on the U.C.C. for protection of their own works.

The revised text of the Berne Convention as signed at Stockholm on July 14, 1967, contained, as an integral part, the Protocol Regarding Developing Countries, which was destined to become a household work in some households. Reduced to its barest essentials, the Stockholm Protocol would permit "any country regarded as a developing country in conformity with the established practice of the United Nations" to declare that, instead of the obligations imposed by the Convention proper, it would impose any or all of the following five limitations:

STOCKHOLM'S LIMITATIONS

(1) Reduce the basic term of protection to life-plus-25 years;

(2) Reduce the scope of broadcasting rights somewhat;

(3) Reduce the scope of translation rights as follows:

(*a*) The right of translation into a particular language would "cease to exist" if an authorized translation into that language had not been published within ten years;

(*b*) If, within three years of publication, an authorized translation into a particular language had not been published in the developing country using that language, a compulsory license would be granted upon compliance with certain formalities. The same licensing procedure could be followed if the authorized translation is allowed to go out of print in the country. However, the copyright owner could terminate the license by publishing his own authorized translation in the country within ten years of first publication of the work.

(*c*) Copies made under the compulsory license could be exported under very liberal terms, and the provisions concerning payment are similarly loose.

(4) Reduce the scope of the right to reproduce the work in the same language for "educational or cultural purposes," as follows:

(*a*) If, within three years of first publication, an authorized edition has not been published, in the developing country, a compulsory license could be granted upon compliance with certain formalities. The same licensing procedure would be followed if the work is allowed to go out of print.

(*b*) The same provisions concerning termination of the license, export, and transfer of royalties as those applicable to translations would apply to works reproduced under a compulsory license.

(5) On top of all this, Article 1(e) of the Protocol would allow a developing country, "exclusively for teaching, study and research in all fields of education," to restrict the protection of literary and artistic works, provided there was some compensation. However, royalties could be blocked entirely and, although the ability to export would be somewhat more limited under this catch-all article then in the case of standard translation and reproduction licenses, export of copies would be allowed.

AUTHORS WERE DISTURBED

Obviously, authors and publishers in the countries that are exporters of cultural goods were deeply disturbed by this entire program, and were particularly incensed

by the loose export provisions under which control over geographical marketing arrangements could be irretrievably lost. However, the lighted match in the tinder barrel was Article 1(e); a product of frantic last-minute drafting, it was aptly called the "coach-and-horses" provision because one could readily drive the same through it. It was unlimited as to subject matter; and, as long as the purpose was for "teaching, study and research," any use, including performance, broadcasting and adaptation, would be permitted without even the formalities governing compulsory licensing.

The impasse produced by the Stockholm Protocol caused a revival of the proposal to amend the U.C.C. in a way that would induce developing countries to leave the Berne Union or never to adhere to it, and to rely upon or adhere to the Universal Copyright Convention instead. Had this effort succeeded, the balance between the two conventions would have been disturbed if not destroyed, with the scales of power ultimately tipping in favor of the U.C.C. with its lower level of protection. Incredible as it still seems to this writer, there were among the advocates of the highest level of copyright protection those who would have preferred to see the Berne Union purged of developing countries and left to a small group of rich exporting countries. The sad history of the United States in international copyright affairs is enough of an example to prove how short-sighted this attitude was, but in an era of instantaneous global and extra-global communications, the myopia seems more like blindness.

The difficult period of negotiations that went on continuously during 1968, 1969, and 1970 produced a compromise proposal which, in turn, formed the basis for the Paris Conventions of 1971. Again, in oversimplified form, the Paris revisions of the Berne and Universal Conventions can be summarized as follows:

(1) The provision preventing states from denouncing the Berne Convention, and relying upon the U.C.C. in their relations with Berne Union members, was made inapplicable to developing countries. However, since the obligations imposed on developing countries under both the revised U.C.C. and the new text of Berne are about the same, there would be little incentive for present Berne members to leave the Union, and the chances seem good that many countries will join both conventions.

(2) The substantive articles of the Stockholm Act, including the Protocol Regarding Developing Countries, will become a dead letter as soon as the Paris Act replacing them takes effect. The basic substantive articles, minus the Protocol, will be resurrected as part of the Paris Act, however.

(3) For the first time, real minimum rights have been written into the Universal Copyright Convention, and this is a genuine and meaningful improvement in the international protection of authors. As adopted, the Paris text of the Universal Copyright Convention requires contracting states to grant "the basic rights ensuring the author's economic interests, including the exclusive right to authorize reproduction by any means, public performance and broadcasting." The General Report of the Conference makes clear that the word "including" in this key phrase is "not to be interpreted as limitative or exhaustive."

(4) If the requirement for granting these minimum rights had been completely unqualified, a number of countries now parties to the U.C.C. would be unable to ratify the new text. The most prominent example is the United States, with its jukebox exemption, limitations against control of CATV transmissions, and similar oddities. The Paris revision of the Universal Convention, therefore, provides that, as long as a country accords "a reasonable degree of effective protection" to each of the exclusive rights, it can make exceptions "that do not conflict with the spirit and provisions of this convention." The General Report of this provision confirms a point frequently made at the conference and eventually dubbed the "*a contrario* principle"; that, since the revised convention elsewhere allows developing countries to make special limitations in the form of compulsory licensing provisions, these or similar exceptions will not be available to developed countries. In any case, the report states, "no State would be entitled to withhold entirely all rights with respect to reproduction, public performance, or broadcasting, that where exceptions are made they must not be applied arbitrarily, and that the protection offered must be effectively enforced."

NEEDS OF DEVELOPING COUNTRIES

(5) The basic purpose of the revisions of both the Universal and the Berne Conventions was to afford parallel concessions applicable to developing countries that would meet the genuine needs of those countries, would not force them out or exclude them from the international copyright community, but that would not

damage or impair the rights of authors and other copyright owners. Because the two conventions are so different in origins and content, this proved an immensely difficult technical task, but in the opinion of this writer the basic purpose was achieved.

The Stockholm Protocol contained provisions allowing developing countries to limit rights as to broadcasting and the duration of protection. These concessions were dropped entirely in both new revisions. More important, the "coach-and-horses" provision of Article 1(e) of the Protocol also vanished completely. The concessions to developing countries in the Paris texts of both the Berne Convention and the U.C.C. are confined exclusively to the rights of translation and reproduction.

(7) A provision in the Paris Act of the Berne Convention conditions its entry into force upon the ratification of the new Universal Convention by four countries: France, Spain, the United Kingdom, and the United States. Thus, unless the United States ratifies the Paris text of the Universal Convention, the parallel revision of the Berne Convention will fail, and the Stockholm Protocol will spring back to life.

NO RETURN TO 20 YEARS AGO

It is easy enough to carp about minor ambiguities and obscurities in any treaty, or in any statute or contract for that matter, and to mount an attack based on the assumption that no concessions or compromises needed to have been made. It is doubtful, however, that authors, publishers, and copyright owners in the United States can afford this luxury. What we must confront is, first, that unless the 1948 Berne and 1952 Universal Conventions are revised in a reasonable way, the outcome will not be reasonable. It is pointless to talk about downgrading international copyright protection as it existed twenty years ago. What we must consider is the possibility of upgrading protection from the dangers of the Stockholm Protocol of 1967 or, worse, of worldwide piracy, remembering that in 1971 more than half of the countries of the world belong to no copyright convention and that each is a potential Taiwan.

The translation and reproduction provisions of the Paris revisions of the Universal and Berne Conventions are, from the viewpoint of copyright owners, an extraordinary improvement over the Stockholm Protocol. These improvements and safeguards are too large in number and too technically complex to explain in detail here, but the following is a summary of some of the main ones:

(1) The *bête noire* of Stockholm, Article 1(e) of the Protocol, under which a developing country could have justified any restriction on copyright in the name of "teaching, study and research," has been suppressed entirely.

(2) Under the Stockholm Protocol, a compulsory translation license could be granted for any purpose, and the only restriction on reproduction licenses was that the purpose be "educational or cultural purposes," a barn-door limitation if there ever was one. Under Paris, translation licenses are permitted only for purposes of "teaching, scholarship or research," and reproduction licenses only for "systematic instructional activities."

(3) Export of copies made under a compulsory license was practically unrestricted under the Stockholm Protocol. It is forbidden under the Paris texts. A specific exception allowing export to nationals of the licensing country who are living abroad is so hedged with safeguards as to preclude any possibility of abuse. More controversial was an interpretation, adopted by the conferences and written into the General Reports, that would allow a developing country lacking any publishing and printing facilities capable of doing the work to grant a license allowing the licensee to go abroad to have the editorial and reproduction processes done for him. However, all copies must be returned in bulk, for distribution solely in the developing country, and the Reports make clear that, in all other cases, the printing and editorial preparation must be done in the licensing country. The moving force behind this proposal came from five French-speaking countries in West Africa, and its impact on American authors and publishers seems minimal at most. Indeed, the United States was the only developed country seriously contesting the interpretation, which was accepted by the French delegation, and it is hard to understand the controversy this minor matter aroused among one or two representatives of U.S. interests at Paris.

(4) Under the Stockholm Protocol, the right of translation into a particular language could be lost after ten years unless a translation into the language had been published. This provision was dropped in the Paris revision.

(5) The granting of compulsory licenses under the Paris revisions is anything but automatic, and in the opinion of this writer will be rare, serving as a last re-

sort rather than a regular practice. There is a waiting period in all cases, ranging from one year and nine months (for translation into non-world languages) to seven years (for reproduction of works of belles-lettres). There must be a *bona fide* effort to contact the copyright owner to obtain a negotiated license; if the owner is found, the compulsory license can be invoked only if he refuses to grant a negotiated license. If he cannot be found, the revised conventions contain elaborate machinery requiring the sending out of notices. A compulsory license can be cut off, either before or after it is issued, by the publication of an authorized translation or reproduction.

WHERE SHOULD THE U.S. STAND?

The United States can ratify the Universal Convention as revised at Paris without any change in its domestic law. The procedure involves affirmative action by the President, with the advice and consent of the Senate. Is ratification in the best interests of U.S. authors and other copyright owners?

The answer must be an unqualified and emphatic *yes*. Ratification of the Paris revision of the U.C.C. will substantially help in restoring stability in international copyright and will materially strengthen both the Berne and Universal Conventions. Copyright protection as between developed countries will be enhanced, and developing countries will be induced to join one or both of the new conventions. The results of our failure to ratify are obvious: revival of the Stockholm Protocol, denunciations of one or both existing conventions, weakening of both Berne and of the U.C.C., and a substantial increase in piracy on a global scale. With these alternatives before us, what choice can there be?

TEXT OF STATEMENT OF EXECUTIVE BUREAU OF INTERNATIONAL CONFEDERATION OF SOCIETIES OF AUTHORS AND COMPOSERS (CISAC), ENDORSING RATIFICATION OF 1971 PARIS REVISION OF BERNE AND UNIVERSAL COPYRIGHT CONVENTIONS.

The Executive Bureau of CISAC meeting in New York on September 30 and October 1, 1971

Having examined the texts of the Berne Convention and the Universal Copyright Convention revised in Paris last July.

Notes that these texts include unquestionable improvements over the Protocol adopted in Stockholm in 1967 and bring about a positive contribution to the overall evolution of international copyright;

Consequently favors the ratification of these revised instruments.

Although favoring ratification, including measures that will aid the educational activities of developing countries, it regrets that this should be done at the expense of authors, by impairing their rights in the field of translation and reproduction, rather than by providing a financial subsidy at the expense of the developed states.

EXCERPT FROM THE MINUTES OF MEETING OF THE BOARD OF DIRECTORS OF AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, HELD ON JANUARY 27, 1972

Counsel advised the Board that the State Department (through Bruce D. Ladd, Jr., Deputy Assistant Secretary of State for Commercial Affairs and Business Practices and co-Chairman of the United States Delegation to the Paris Conferences) informs us that the President of the United States will shortly submit to the United States Senate for ratification, the 1971 Paris Revision of the Universal Copyright Convention.

The Paris Revisions of the Universal and Berne Conventions were designed primarily to resolve an impasse between the "developing" countries and the "developed" countries resulting from the Stockholm revision of the Berne Convention in 1967. The Stockholm Protocol adopted at that time would make it impossible for the United States to join the Berne Convention in the future because of the erosion of copyright protection in important areas. This would not affect existing members of the Berne Union because they are not bound by the Stockholm revision unless they ratify it. On the other hand, countries such as the United States that are not now members of Berne, could not in the future adhere to the Convention as it stood prior to the Stockhom Revision. This would leave the Universal Copyright Convention as the only worldwide Convention available to the United States as a practical matter—and there was a threat that the develop-

ing countries would succeed in transferring the substance of the Stockholm Protocol to the Universal Copyright Convention.

The Paris Revisions of the two Conventions, which sought to reconcile the positions of the developing and developed countries, have accomplished their purpose. The Revision of the Berne Convention eliminates the Stockholm Protocol. It will not become effective, however, unless the United States, the United Kingdom, France and Spain ratify the Paris revision of the Universal Copyright Convention.

The changes in both Conventions were reviewed by the Executive Bureau of CISAC last fall and it recommended ratification of both Conventions. ASCAP joined in that recommendation, a copy of which is attached to these minutes.

After this explanation of Counsel, the following resolution was unanimously adopted in support of ratification by the United States of the Paris Revision of the Universal Copyright Convention:

Resolved, That the American Society of Composers, Authors and Publishers on behalf of its 17,000 composer-author-and publisher members, endorses the ratification by the United States of the Universal Copyright Convention as revised at Paris on July 24, 1971.

THE AUTHORS LEAGUE OF AMERICA, INC.,
New York, N.Y., August 8, 1972.

Hon. J. WILLIAM FULBRIGHT,
Chairman, Committee on Foreign Relations,
U.S. Senate,
Washington, D.C.

DEAR SENATOR FULBRIGHT: When I testified before the Committee yesterday on the 1971 Universal Copyright Convention, I mentioned a report of the American Bar Association, in connection with the ABA's resolution endorsing ratification. Subsequently, Mr. Herman Finkelstein, testifying for the ABA, handed the Committee two reports.

To avoid any confusion on the record, I would like to submit to the Committee a copy (enclosed) of the American Bar Association Report I referred to, and ask that it be included in the record of the hearing, along with this letter.

The enclosure is a four page document captioned: "AMERICAN BAR ASSOCIATION—JOINT REPORT OF SECTION OF INTERNATIONAL AND COMPARATIVE LAW AND SECTION OF PATENT, TRADEMARK AND COPYRIGHT LAW."

I understand this document was submitted to the ABA's House of Delegates. The portion of this Report I referred to is Par. 3 on page 3 which described the compulsory license provisions as follows: "Certain exceptions to the right of translation are introduced in favor of developing countries. Compulsory licenses are permitted where a translation in the developing country's language is not available."

Respectfully yours,

IRWIN KARP, *Counsel.*

AMERICAN BAR ASSOCIATION—JOINT REPORT OF SECTION OF INTERNATIONAL AND COMPARATIVE LAW AND SECTION OF PATENT, TRADEMARK AND COPYRIGHT LAW.

RECOMMENDATION

The Section of International and Comparative Law and the Section of Patent, Trademark and Copyright Law jointly recommend adoption of the following resolution by the American Bar Association:

"*Resolved*, That the American Bar Association endorses the ratification by the United States of the Universal Copyright Convention as revised at Paris on July 24, 1971, and that the Section of International and Comparative Law and the Section of Patent, Trademark and Copyright Law are authorized to present the position of the Association in this matter before Congress."

REPORT

There are two basic conventions that govern International Copyright relations: the Universal Copyright Convention (UCC) to which the United States has been a party since 1954 and the older Berne Convention (Berne) to which the United States has not thus far adhered. The two conventions have been independent of

each other except that when the UCC was formulated in 1952 it was agreed that it was not to be used to undermine Berne. In order to insure this, Article 17 of the UCC provided that the works of a country that has withdrawn from Berne will not be given protection under the UCC in other Berne countries. Thus a member of Berne may not leave that convention and rely upon the UCC to govern its international copyright relations. This is called the Berne Safeguard Clause and was adopted to insure the continuing high level of copyright protection under the Berne Convention as contrasted with the UCC which, until the Paris revision had no minimum requirements except recognition of the right of translation and a relatively short term of copyright.

At the Stockholm Conference to revise the Berne Convention in 1967, the developing countries were successful in a drive to enable them, within the framework of Berne, to use copyrighted works originating primarily in the developed countries without payment when such uses were for educational or cultural purposes. This modification of the Berne Convention has become known as the "Stockholm Protocol".[1] Much to the surprise of the proponents of the Protocol, the Stockholm revision of the Berne Convention was not ratified by the leading members of Berne whose works they intended to use, namely France, Spain and the United Kingdom. The only developed country which had ratified Stockholm was Sweden (the host to the Stockholm Conference) whose works were of little interest to the developing countries.

As a result of the failure of the Stockholm Protocol, the developing countries engaged in a move to revise the UCC in two respects: (1) by eliminating the Berne Safeguard Clause and (2) by transferring the Stockholm Protocol for all practical purposes from the Berne Convention to the UCC. If this move were successful, the developing countries would give up their membership in Berne and American works would in effect be subject to confiscation in the developing countries when used for educational or cultural purposes.

In order to find some method of satisfying the legitimate needs of developing countries and at the same time maintaining the integrity of the international copyright system, committees representing Berne and the UCC worked together with the very active cooperation of the United States to find a basis for revising both conventions at conferences to be held in Paris in July 1971.

Those conferences were concluded on July 24, 1971, with revisions of the UCC and Berne that resulted in an agreed accommodation between the developed and developing countries. In addition, certain basic minimum rights were added to the UCC which originally provided only for the right of translation. The Paris Revision changes the UCC in the following respects:

1. The Berne Safeguard Clause is preserved for developed countries but developing countries may now withdraw from Berne without suffering any penalty.

2. The rights of reproduction, public performance and broadcasting are added to the right of translation as basic rights to be recognized in countries adhering to UCC. This will not require a change in our existing law. As the report accompanying the convention points out, "No country now meeting the obligations of the 1952 convention and according basic copyright protection would be required to assume new obligations in adhering to the 1971 convention" (Report, para. 44).

3. Certain exceptions to the right of translation are introduced in favor of developing countries. Compulsory licenses are permitted where a translation in the developing country's language is not available.

4. In addition to compulsory licenses for translations, developing countries are permitted to authorize the reproduction of works on a compulsory license basis if copies of a particular edition of a work have not been distributed in the country to the general public or in connection with systematic instructional activities. At least three years must elapse before such a license may be issued in the case of works in the natural and physical sciences; the period applied to works of fiction, poetry, drama, music and art books, however, is longer—seven years. For other works it is five years.

Turning to the Paris revision of Berne, although the United States is not a party to that Convention, the United States is directly involved because the Paris revision of Berne does not become operative unless the United States, France, Spain and the United Kingdom adhere to the Paris revision of the UCC.

[1] The implications and repercussions of the Stockholm Protocol are analyzed in Lazar, "Developing Countries and Authors' Rights in International Copyright," *ASCAP Copyright Law Symposium Number Nineteen* 1 (1971); Schrader, "Armageddon in International Copyright: Review of the Berne Convention, the Universal Copyright Convention, and the Present Crisis in International Copyright," 2 *Advances in Librarianship* 306 (1971); Ringer, "Role of the United States in International Copyright," 56 *Georgetown Law Journal* 1050 (1968).

Consequently, if the United States does not adhere to the UCC Revision the latest Berne Revision will be the one signed at Stockholm in 1967 which includes the troublesome Protocol. If this happens the basic purpose of the Paris Revision of both conventions will have been defeated.

Although the United States is not a party to the Berne Convention our scientific, literary and musical works are protected throughout most foreign markets under that Convention. We are an exporting country in these fields and our works secure Berne protection by simultaneous publication in Canada or another Berne country. It is hoped that when our domestic law is revised we will be in a position to join the Berne Convention (with some slight modifications in that Convention) or that we may foster a merger of the two conventions. This will not be possible if the Stockholm Protocol remains a part of the Berne Convention because not only the United States but countries such as the United Kingdom, France and Spain, among others, will not adhere to the Stockholm revision of Berne so long as it contains the Protocol.

In the interest of advancing the cause of copyright throughout the world, the revisions of the UCC and Berne should become a reality. This is very much in the interest of the United States.

Accordingly, we urge that the American Bar Association adopt a resolution endorsing ratification by the United States of the UCC as revised at Paris on July 24, 1971.

Respectfully submitted.

HARRY A. INMAN,
Chairman, Section of International and Comparative Law.

DONALD W. BANNER,
Chairman, Section of Patent, Trademark and Copyright Law.

FEBRUARY, 1972.

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